Supreme Court, U. S.
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No. 79-972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA, AND
GEORGIA-PACIFIC CORPORATION,
Petitioners,

v.

ADAMS EXTRACT COMPANY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

PETITION FOR CERTIORARI FILED DECEMBER 21, 1979
CERTIORARI GRANTED JUNE 16, 1980

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
12-21-77	2	(JVS) PRACTICE and PROCEDURE ORDER, w/copy Pretrial Order No. 2 and Schedule A, filed. cc: Liaison for Pltfs. and Defts., and MDL Panel.
3-20-78	28	UNIFIED and CONSOLIDATED COMPLAINT, CLASS ACTIONS for Violations of Antitrust Laws, w/JURY DEMAND, filed. (Amends actions listed in Exhibit I, attached)
12- 4-78	235	MEMORANDUM of Pltfs. in Support of Motion for Tentative Approval of Proposed Partial Settlements with Defts. International Paper Co. and St. Regis Paper Co., filed. (All actions except CA H-78-671)
12- 4-78	237	AFFIDAVIT on Behalf of Defts. St. Regis Paper Co., in Support of Settlement Agreement, filed. (All actions except CA H-77-2158 78-04, 78-376, 78-671, 78-1226, 78-1263, 78-1815 and 78-2004)
12-11-78	244	MOTION of Deft. Westvaco Corp. for Leave to File Amended Answer and Cross-Claim, w/MEMORANDUM in Support Thereof, filed. (All actions except those identified on Exhibit II annexed to Unified and Consolidated Complaint, and CA H-78-671, H-78-1226 and H-78-1263) (cc JVS)
12-12-78	258	SUPPLEMENTAL MEMORANDUM of Certain Defts. (listed on attached page) in Support of Their Motion for Protective Order Prohibiting Disclosure of Privileged Documents or Information, filed.

DATE	NR.	PROCEEDINGS
12-14-78		(JVS) SETTLEMENT CONFERENCE Re: Proposed Settlements of St. Regis Paper Co., and International Paper Co. Appearances noted on attached Appearance List. Conference to be set during May, 1979 re: preliminary approval of settlement.
12-28-78	286	AGREEMENT of SETTLEMENT Between Boise Cascade Corporation and All Class Action Pltfs., filed. (All actions except H-77-2158, 78-04, 78-376, 78-671, 78-1226, 78-1263, 78-1815 and 78-2004.)
3- 1-79	509	MOTION of Deft. Westvaco Corp., for Leave to File Amended and Supplemental Answer and Cross-Claim, filed. (cc JVS) (All actions except those identified on Exhibit II Annexed to Unified and Consolidated Complaint, and CA H-78-671, 78-1226 and 78-1263.)
4-16-79	531	MOTION of Class Pltfs. for Preliminary Approval of Settlements, w/MEMORANDUM in Support Thereof, *FILED UNDER SEAL.*
5- 9-79	634	MOTION of Deft. Packaging Corporation of America for Leave to File Amended and Supplemental Answer and Cross-Claim, filed. (cc JVS) (Relates to all actions except those identified on Exhibit II Annexed to the Unified and Consolidated Complaint, and CA. H-78-671, H-78-1226 and H-78-1263)
5-10-79	636	MOTION of Deft. Georgia-Pacific Corporation for Leave to File Amended Answers and Cross-Claims, filed. (cc JVS) (Relates to all class actions in which Georgia-Pacific Corp., has been named as a Deft.)

DATE	NR.	PROCEEDINGS
5-11-79	645	OBJECTIONS of Certain Active and Reserve Class Representatives to Preliminary Approval of Proposed Settlements, filed. (By Granvil I. Specks and James B. Sloan on behalf of Active and Reserve Class Representatives listed thereon.)
5-21-79	672	MOTION of Deft. Packaging Corp. of America for Leave to File Amended Answer and Cross-Claim, filed. (cc JVS)
5-30-79	694	(JVS) PRETRIAL ORDER No. 13, filed. P/n. a.s. 1. MOTIONS of various non-settling defendants for leave to file cross-claims for contribution against settling defendants-DENIED. (Reasons for this decision set forth in following Memorandum Opinion filed 5-30-79.) All cross-claims for contribution which have been filed are dismissed w/prej.; this decision is entered as a final judgment. 2. MOTIONS of various non-settling defendants for leave to file amended or supplemental answers-DENIED. 3. MOTION of Deft. Mead Corporation to decertify the "class and sub-class" as to non-settling defendants-DENIED. 4. MOTION of Deft. Container Corporation to decertify the sheet plant sub-class and to exclude sheet plants from further class status-DENIED. 5. MOTION of Deft. St. Joe Paper Co. that sheet plant sub-class be merged with container purchaser sub-class-DENIED at this time.

DATE	NR.	PROCEEDINGS
	6.	As to Pltfs. MOTION for rehearing w/respect to Paragraph 11 of Pretrial Order No. 11, it is ordered that Pretrial Order No. 11, paragraph 11, be modified to read: "Plaintiffs' joint objection to defendants' request for documents number 15, requesting financial data on plaintiff companies not publicly held, is SUSTAINED.
	7.	MOTION of Pltfs. for order concerning videotape and telephone depositions-GRANTED as modified herein (see this order for details).
	8.	As to Pltfs. MOTION re: disclosure of materials in government document depository, the following briefing schedule shall apply: Defts. and United States to respond by 5-24-79; Pltfs. to reply by 5-31-79, and individual witnesses to file responses they wish Court to consider by 6-1-79. HEARING on this question set for 6-4-79 at 10:00 a.m.
	9.	MOTION of Pltfs. for preliminary approval of class settlements with following defendants GRANTED: See this order for named Defts. (FINDINGS of FACT re: Settlements follows, filed 5-30-79)
	10.	NOTICE of Depositions of Messrs. Susman, Montague, Hoyt, Robertson and Harrison, filed 5-2-79, and subpoenas relating thereto are hereby quashed.

DATE	NR.	PROCEEDINGS
5-30-79	695	(JVS) MEMORANDUM OPINION, filed, DENYING MOTIONS of Defts. Westvaco, Packaging Corporation of America, Georgia-Pacific and Crown Zellerbach for leave to amend their answers to assert cross-claims for contribution against certain other defendants who have entered into settlement agreements with plaintiffs' class-DENIED. P/n. a.s.
5-30-79	696	(JVS) FINDINGS of FACT and CONCLUSIONS of LAW Concerning PROPOSED SETTLEMENT AGREEMENTS, filed. P/n. a.s.
6- 8-79	714	NOTICE OF APPEAL of Deft. WESTVACO CORP. to Pretrial Order No. 13 entered 5-30-79, filed.
6-11-79	717	NOTICE OF APPEAL of Deft. GEORGIA-PACIFIC CORP. to Pretrial Order No. 13 entered 5-30-79, filed.
6-15-79	725	NOTICE OF APPEAL of Deft. PACKAGING CORP. of AMERICA to Pretrial Order No. 13, entered 5-30-79, filed.
6-25-79	736	NOTICE OF APPEAL of Deft. WESTVACO CORP. to Pretrial Order No. 13, paragraph 2 entered 5-30-79, filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

MDL No. 310

(All Cases)

PRACTICE AND PROCEDURE ORDER

Filed December 21, 1977

1. Pending further orders of this court, this order shall govern the practice and procedure in those actions transferred to this court by the Judicial Panel on Multidistrict Litigation pursuant to its order of November 29, 1977, as well as all related actions originally filed in this court or transferred or removed to this court. These actions are listed in Schedule A attached hereto. This order shall also govern the practice and procedure in any tagalong cases transferred to this court by the Judicial Panel on Multidistrict Litigation pursuant to Rule 9 of the Rules of Procedure of that panel subsequent to the filing of the final transfer order by the clerk of this court and any related actions subsequently filed in this court or transferred or removed to this court.

2. The actions described in paragraph 1 of this order are hereby consolidated for pretrial purposes.

3. A signed original of any pleading or paper shall be filed; no additional copies are necessary. All papers filed in these actions shall bear the style and * * *

* * * *

8. All discovery proceedings in these actions and the time for filing responsive pleadings in this case are stayed until further order of this court. The time requirements to perform any acts or file any papers pursuant to Rule 12 and Rules 26 through 37 of the Federal Rules of Civil Procedure are tolled until the first pretrial conference, at which time a discovery schedule will be established.

9. Any orders, including protective orders previously entered by this court or any transferor court, shall remain in full force and effect unless modified by this court upon application.

10. Attached is a copy of an order already entered by this court relating to the organization of plaintiffs' counsel and related matters. Mr. Robert J. Malinak of the law firm of Baker & Botts, is designated as interim liaison counsel for the defendants. As indicated, attached is Pretrial Order No. 2 concerning the organization of plaintiffs' counsel which has been approved by this court. By date of the first pretrial conference, the defendants are requested to organize themselves along the same lines and to adopt the same or reasonably similar organizational order. If such has not been done by agreement, this court contemplates ordering defendants' counsel to accomplish this result.

11. All scheduling of conferences or appearances before the court shall be made through Ms. Angie Sierra, Deputy Clerk, at (713) 226-4261.

12. The court will be guided by the Manual for Complex and Multidistrict Litigation, approved by the Judicial Conference of the United States. All counsel are directed to familiarize themselves with that publication.

13. Liaison counsel for plaintiffs, William E. Wright, is preparing a codification of local rules relating to the United States District Court for the Southern District

of Texas, and a copy of such local rules can be obtained from Mr. Wright.

14. The court is acutely aware of the magnitude of this litigation and of the potential expense to the litigants and the burdens that the litigation will impose upon all the parties and the attorneys. To that end the court expects and will, if necessary, require all attorneys and clients to cooperate to the fullest extent to lessen the potential expense and the burden of time. For example, the court would expect that counsel on all sides attempt in every way to keep to a minimum the number of motions proposed to be filed and, where possible, file only one motion, pleading, or brief pertaining to the same subject matters. Although this court does not have a general order to this effect and does not contemplate entering one, except if it becomes necessary, the number of interrogatories that are submitted to each party or to each potential witness should be limited to absolutely necessary questions. The court is mindful of the fact that in some United States District Courts, the number of interrogatories is limited to twenty questions that can be submitted to any one party or any one witness. Also, the court expects complete cooperation regarding the scheduling of depositions and this likewise should be limited to only those depositions that are absolutely necessary for either discovery or for the perpetuation of testimony.

15. The court also expects counsel to develop a procedure for expediting service of process or waivers thereof, where such has not been heretofore effected, so as to lessen the burden of unnecessary paper work by the clerk and the Marshal's office.

16. During the pendency of this litigation, each of the parties herein and their respective officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them who receive actual

notice of this Order by personal service or otherwise, are restrained and enjoined from destroying or causing the destruction of, or permitting the destruction of, any arguably relevant documents or other arguably relevant items now existing, except upon prior approval of the court obtained by application showing cause therefor, with notice to all other parties of such application, providing them an opportunity to be * * *

* * * * *

(b) The establishment of a schedule for early determination of the class action questions, including a schedule for prompt completion of discovery relative to the class action issue and the entry of appropriate orders to prevent potential abuse. The court does not contemplate staying discovery on the class action features of these cases pending the outcome of any grand jury investigation or the return of any indictments. At the initial pretrial conference, the court will permit reasonable oral arguments on this question.

(c) Procedure for expediting service as mentioned in paragraph 15.

DONE at Houston, Texas, on the 21st day of December, 1977.

/s/ *John V. Singleton, Jr.*
United States District Judge

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

Master File No.

Honorable John V. Singleton

C.A. No. 77-H-461

ADAMS EXTRACT CO., *et al.*,
Plaintiffs,

vs.

ALTON BOX BOARD COMPANY, *et al.*,
Defendants.

PRETRIAL ORDER NO. 2

1. *Organization of Plaintiffs' Counsel.* The Organizational structure established by this order shall include all counsel in all actions, whether brought as class actions or as individual actions, except as otherwise indicated.

2. *Committee of Plaintiffs' Counsel.* The Committee of Plaintiffs' Counsel, consisting of all plaintiffs' attorneys in these actions, shall have ultimate authority for conducting the pretrial activities of the plaintiffs. In litigation of this magnitude and complexity, it is imperative that attorneys cooperate with each other to the fullest extent possible so that pretrial procedures may move forward with dispatch and a minimum of friction.

3. *Steering Committee.* The Steering Committee of the Committee of Counsel shall provide general supervision and direction to the activities of plaintiffs' counsel. It is expected to maintain communication and promote harmonious dealings among all plaintiffs' counsel.

The Steering Committee shall execute the orders of the Court concerning the conduct of the litigation; receive, formulate, and draft material for the plaintiffs, including material such as interrogatories, pleadings, motion papers, and the like; initiate and supervise discovery efforts of the plaintiffs; and initiate proceedings in Court, proceedings outside of Court, and all negotiations with defendants.

The Steering Committee shall act as spokesman for plaintiffs' counsel in matters of joint or common action. This does not derogate from the right of other counsel to be heard on matters not susceptible of joint or common action or when *genuine* and *substantial* disagreement exists among counsel. The Court disfavors the presentation of cumulative views or views that differ from the Steering Committee's in only minor and petty ways.

The Chairman of the Steering Committee shall preside over meetings of the committee and supervise the overall activity of the committee. He shall appoint the members of all other committees and subcommittees, subject to the disapproval of the majority of the Steering Committee, and shall perform whatever other functions may be assigned to him by the Court and the Steering Committee. The Chairman, together with the Vice Chairman, may act for the committee whenever it is impracticable to obtain a decision of the committee.

To carry out the duties and responsibilities set forth above, the Court appoints the following counsel to serve on the Steering Committee in the positions indicated unless and until replaced by the Court:

Stephen D. Susman
Mandell & Wright
Houston, Texas
Chairman

Vance K. Opperman
Doherty, Rumble & Butler
St. Paul, Minnesota
Vice Chairman

Allen D. Black
Fine, Kaplan & Black
Philadelphia, Pennsylvania * * *

* * * *

shall report it to all counsel with an indication of each party's pro rata share of the total. The Steering Committee will maintain an account to which the parties will contribute and from which the Liaison Counsel will be paid.

_____ _____

Date United States District Judge

Approved as to form and substance by:

/s/ *Stephen D. Susman*
STEPHEN D. SUSMAN
on behalf of all Plaintiffs

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. No. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

ALL ACTIONS EXCEPT THOSE
IDENTIFIED ON EXHIBIT II
HERETO AS NOT INCLUDED

UNIFIED AND CONSOLIDATED COMPLAINT CLASS ACTIONS FOR VIOLATIONS OF ANTITRUST LAWS JURY TRIAL DEMANDED

Filed March 20, 1978

UNIFIED AND CONSOLIDATED COMPLAINT

1. This Unified and Consolidated Complaint ("this Complaint") is filed pursuant to the Order of the above-entitled Court ("the Court") filed on March 2, 1978. This Complaint amends each of the complaints in the actions filed by the plaintiffs identified in Exhibit I hereto.

JURISDICTION

2. This litigation arises under Section 1 of the Sherman Act, 15 U.S.C. § 1.

3. The Court has jurisdiction of this litigation under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 & 26, and under 28 U.S.C. § 1337.

VENUE

4. Each defendant maintains an office or plant, transacts business, is found, or has an agent within the Southern District of Texas, or in such other district or districts wherein any action was commenced against such defendant and thereafter transferred to the Court pursuant to 28 U.S.C. § 1407, or in all of said districts. The claims alleged herein against each defendant arose in the Southern District of Texas, or in such other district or districts wherein any action was commenced against such defendant and thereafter transferred to the Court pursuant to 28 U.S.C. § 1407, or in all of said districts. The interstate trade and commerce involved and affected by the violations alleged herein were, at all times material hereto, and are now, carried on, in part, within the Southern District of Texas, or in such other district or districts wherein any action was commenced against such defendant and thereafter transferred to the Court pursuant to 28 U.S.C. § 1407, or in all of said districts.

5. The Southern District of Texas is the proper forum for the conduct of pre-trial proceedings in this litigation pursuant to 28 U.S.C. § 1407, and the Opinion and Order of the Judicial Panel on Multidistrict Litigation, dated November 29, 1977. *In re Corrugated Container Antitrust Litigation*, 441 F. Supp. 921 (J.P.M.D.L. 1977).

PARTIES

6. The names of the plaintiffs are set forth in Exhibit I hereto, which is incorporated herein by this reference.

7. Each of the plaintiffs purchased corrugated containers or corrugated sheets, or both corrugated containers and corrugated sheets, from one or more of the defendants, or subsidiaries or affiliates of the defendants, during the period of time covered by this Complaint.

8. Each of the corporations named in this paragraph 8 is made a defendant herein. The corporate defendants and their respective states of incorporation and principal places of business are listed below. During all or part of the period of time covered by this Complaint, each of the corporate defendants engaged in the business of manufacturing and selling corrugated containers or corrugated sheets, or both, in the United States.

Name of Corporate Defendant	State of Incorporation	Principal Place of Business
Alton Box Board Company	Delaware	Alton, Illinois
Boise Cascade Corporation	Delaware	Boise, Idaho
Champion International, Inc.	New York	Stamford, Connecticut
The Chesapeake Corporation of Virginia	Virginia	West Point, Va.
Consolidated Packaging Corporation	Michigan	Chicago, Illinois
Container Corporation of America	Delaware	Chicago, Illinois
The Continental Group, Inc.	New York	New York, N.Y.
Corco, Inc.	Ohio	Worthington, Ohio
Crown-Zellerbach Corporation	Nevada	San Francisco, Cal.
Diamond International Corporation	Delaware	New York, N.Y.
Dura-Containers, Inc.	Delaware	Indianapolis, Ind.
Fibreboard Corporation	Delaware	San Francisco, Cal.
Georgia-Pacific Corporation	Georgia	Portland, Oregon
Green Bay Packaging, Inc.	Wisconsin	Green Bay, Wis.
Hoerner Waldorf Corporation	Delaware	St. Paul, Minn.
Inland Container Corporation	Indiana	Indianapolis, Ind.

Name of Corporate Defendant	State of Incorporation	Principal Place of Business
International Paper Company	New York	New York, N.Y.
Interstate Container Corporation	New York	New York, N.Y.
Longview Fibre Company	Delaware	Longview, West Va.
MacMillan Bloedel, Inc.	Alabama	Stamford, Conn.
MacMillan Bloedel Containers, Inc	Delaware	Chicago, Illinois
The Mead Corporation	Ohio	Dayton, Ohio
Menasha Corporation	Wisconsin	Neenah, Wisconsin
Olinkraft, Inc.	Delaware	West Monroe, La.
Owens-Illinois, Inc.	Ohio	Toledo, Ohio
Packaging Corporation of America	Delaware	Evanston, Ill.
Potlatch Corporation	Delaware	San Francisco, Cal.
St. Joe Paper Company	Florida	Jacksonville, Fla.
St. Regis Paper Company	New York	New York, N.Y.
Southwest Forest Industries, Inc.	Nevada	Phoenix, Arizona
Stone Container Corporation	Illinois	Chicago, Illinois
Union Camp Corporation	Virginia	Wayne, New Jersey
U.S. Corrugated Fibrebox Co.	Indiana	Indianapolis, Ind.
Western Kraft East, Inc.	Oregon	Bellmawr, New Jersey
Westvaco Corporation	Delaware	New York, N.Y.
Weyerhaeuser	Washington	Tacoma, Washington
Willamette Industries	Oregon	Portland, Oregon

9. Within the period of time covered by this Complaint, defendant The Continental Group, Inc. was also known as "Continental Can Company, Inc."

10. Defendant Hoerner Waldorf Corporation has merged into defendant Champion International, Inc.; and

defendant Champion International, Inc. has thereby assumed, among other things, all of the liabilities of defendant Hoerner Waldorf Corporation to plaintiffs and the class arising out of the violations alleged herein.

11. The Fibre Box Association, an unincorporated association, with its principal offices located in Chicago, Illinois, is also made a defendant herein. During all or part of the period covered by this Complaint, said defendant held meetings of various committees and maintained a statistical reporting system which was used or usable by defendants in furtherance of the combination and conspiracy alleged herein.

CO-CONSPIRATORS

12. Various corporations and individuals not made defendants in this Complaint participated as co-conspirators with the defendants in the violation alleged herein, and performed acts and made statements in furtherance thereof.

CLASS ACTION ALLEGATIONS

13. Plaintiffs, by their attorneys, bring these actions for injunctive relief and for treble damages due to defendants' violations of the antitrust laws as class actions pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of all persons in the United States (excluding defendants and all subsidiaries and affiliates of defendants and all independent corrugated box manufacturers) who purchased corrugated containers or corrugated sheets from any defendant, or any subsidiary or affiliate of any defendant, at any time during the period from January 1, 1960, to January 25, 1978. As used

herein, the term "independent corrugated box manufacturers" means and refers to all persons who owned or controlled one or more plants which manufactured containerboard from Kraft liner board and corrugated continers from such containerboard, but who did not manufacture Kraft liner board.

(a) The class is so numerous that joinder of all members is impracticable.

(b) There are questions of law and fact common to the class.

(c) The claims of the plaintiffs are typical of the claims of the class.

(d) The plaintiffs will fairly and adequately protect the interests of the class.

(e) The defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

(f) Questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of this litigation.

The members of the class, including plaintiffs, purchased or paid for corrugated containers or corrugated sheets during the class period and sustained damages as a result of the combination and conspiracy alleged herein.

TRADE AND COMMERCE

14. Corrugated containers are made from that category of paperboard referred to as containerboard. Containerboard and corrugated sheets consist of an inner fluted sheet, the corrugating medium, glued between two liners of flat facings. In the manufacture of corrugated containers, containerboard is printed, scored, creased and die-cut. Joints are fastened by stitching with wire, by taping with gummed tape, or by gluing. Generally, corrugated containers are shipped to the customer in a knocked-down state and are then set up by the user. Corrugated containers are manufactured in a large number of sizes and shapes and are tested for degree of strengths, weights, and resistance to liquid and temperature.

15. Corrugated containers are used as shipping containers by a wide variety of industries because they are strong, lightweight, and relatively inexpensive. Corrugated containers accounted for approximately 18 percent of all packaging sales in 1975. Buyers of corrugated containers include, among others, processors of food and beverage products and manufacturers of paper and printed materials, glass and ceramic products, metals and machinery, chemicals, paints, drugs, soaps and cosmetics, appliances and electrical equipment, clothing textiles and leather, rubber and plastic, furniture and wood, and transportation equipment.

16. During all or part of the period of time covered by this Complaint, corrugated containers and corrugated sheets were sold by the defendant corporations in the United States.

17. During the period of time covered by this Complaint:

(a) The defendant corporations and co-conspirators sold substantial quantities of corrugated containers and corrugated sheets in the United States, which were shipped in a continuous and uninterrupted flow of interstate commerce to customers located in states other than the states in which such corrugated containers and corrugated sheets were manufactured;

(b) Substantial quantities of the materials used by the defendant corporations and co-conspirators in the manufacture of corrugated containers and corrugated sheets regularly moved in interstate commerce from their source to states where corrugated container and corrugated sheet manufacturing facilities are located; and

(c) The sale and shipment of corrugated containers and corrugated sheets to customers in interstate commerce and the purchase and shipment in interstate commerce of materials used in the manufacture of corrugated containers and corrugated sheets were substantially affected by the combination and conspiracy alleged in this Complaint.

VIOLATION ALLEGED

18. Beginning sometime prior to 1960, the exact date being unknown to the plaintiffs, and continuing thereafter until January 25, 1978, there has been a continuing combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

19. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators, the substantial terms of which were to fix, raise

maintain, and stabilize the prices of corrugated containers and corrugated sheets.

20. In formulating and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators did those things which they combined and conspired to do, including, among other things, the following:

(a) Disclosed to other members of the conspiracy prices charged or quoted, or the price to be charged or quoted, to buyers of corrugated containers and corrugated sheets, as well as other information relevant to the pricing of corrugated containers and corrugated sheets;

(b) Received from other members of the conspiracy prices charged or quoted, or the price to be charged or quoted, to buyers of corrugated containers and corrugated sheets, as well as other information relevant to the pricing of corrugated containers and corrugated sheets;

(c) Submitted non-competitive bids or quotations or no bids or quotations to buyers of corrugated containers and corrugated sheets;

(d) Agreed with other members of the conspiracy upon increases in prices of corrugated containers and corrugated sheets; and

(e) Took steps to enforce compliance with the aforesaid combination and conspiracy.

EFFECTS

21. The aforesaid combination and conspiracy has had the following effects, among others:

(a) Purchasers of corrugated containers and corrugated sheets have been deprived of free and open competition in the purchase of corrugated containers and corrugated sheets; and

(b) Competition in the sale of corrugated containers and corrugated sheets among the defendants and co-conspirators has been restrained and prices of corrugated containers and corrugated sheets have been raised to, and fixed, maintained, and stabilized at artifical and non-competitive levels.

FRAUDULENT CONCEALMENT

22. Until on or after March 21, 1977, plaintiffs and the members of the class had no knowledge of any of the violations of the antitrust laws alleged herein, or of any facts which might have led to the discovery thereof. Plaintiffs and the members of the class could not have uncovered any of the violations at any time prior to March 21, 1977, by the exercise of due diligence inasmuch as the unlawful conspiracy was fraudulently concealed by the defendants, who resorted to secrecy to avoid detection of the conspiracy.

INJURY TO PLAINTIFFS

23. During and throughout the period of the aforesaid combination and conspiracy, plaintiffs and the members of the class purchased substantial quantities of corrugated containers and corrugated sheets from one or more of the defendants. By reason of the aforesaid combination and conspiracy, those purchases were made at prices higher than the prices which plaintiffs and the members of the class would have paid in the absence of any such combination or conspiracy.

24. As a result of the aforesaid combination and conspiracy, plaintiffs and the class have sustained substantial losses and damages to their business and property in an amount which is presently undetermined.

PRAYER FOR RELIEF

25. WHEREFORE, plaintiffs pray for judgment against defendants, jointly and severally, and in favor of plaintiffs and the class, as follows:

(a) That the aforesaid combination and conspiracy and the acts done in furtherance thereof by defendants be adjudged to have been in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

(b) That plaintiffs and the other members of the class recover threefold the damages determined to have been sustained by each of them respectively as a result of the conduct of the defendants complained of herein, and that joint and several judgment be entered against defendants, and each of them, for the amount so determined.

(c) That defendants and all other persons acting on their behalf or in concert with them be perpetually enjoined and restrained from conducting, maintaining, renewing, or carrying on the aforesaid combination and conspiracy or any other combination or conspiracy having a similar purpose or effect in restraining competition in the sale of corrugated containers or corrugated sheets.

(d) That plaintiffs recover from the defendants the cost of this suit and reasonable attorneys' fees in accordance with the federal antitrust laws.

(e) That plaintiffs and the class have such other and further relief as the Court may deem just and proper.

MANDELL & WRIGHT
Stephen D. Susman
Chairman, Plaintiffs' Steering Committee
806 Main Street, 21st Floor
Houston, Texas 77002
(713) 228-1521

DOUGHERTY, RUMBLE & BUTLER
Vance K. Opperman
Vice Chairman, Plaintiffs' Steering Committee
1500 First National Bank Building
St. Paul, Minnesota 55101
(612) 291-9333

BY /s/: *Stephen D. Susman*
STEPHEN D. SUSMAN
On Behalf of Plaintiffs' Steering Committee
and all Plaintiffs Indentified In Exhibit I Hereto as Included

JURY DEMANDED

Plaintiffs demand trial by jury, pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, of all issues triable of right by a jury.

MANDELL & WRIGHT
Stephen D. Susman
Chairman, Plaintiffs' Steering Committee
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STEPHEN D. SUSMAN
On Behalf of Plaintiffs' Steering Committee
and all Plaintiffs Indentified In Exhibit I Hereto as Included

[Certificate of Service omitted]

EXHIBIT I

PLAINTIFFS AND CIVIL ACTIONS INCLUDED WITHIN THIS UNIFIED AND CONSOLIDATED COMPLAINT

Plaintiffs	Civil Action Docket Numbers	Comments
1. Adams Extract Co.	77-H-461	
2. After Six, Incorporated Bert Paley, Ltd.	H-77-805	Plaintiff Commonwealth Toy & Novelty Co., Inc. to be dropped pursuant to Federal Rules of Civil Procedure 15 and 21.
3. The Amberley Greeting Card Company The Al Barker Publishing Co. Mr. B. Greeting Card Co., Inc.	H-78-56	
4. Andre-Boudin Bakeries, Inc.	H-78-53	
5. Arcadia Furniture Corporation	H-77-790	
6. Artcraft Press, Inc.	H-77-2147	
7. Austin Products Co.	H-77-782	
8. Bodines, Inc.	H-78-64	
9. The Beaumont Company	H-78-11	
10. Carron Manufacturing Company	H-78-60	
11. Co-ordinated Industries, Inc.	H-78-58	
12. Covington Fabrics Corp.	H-78-10	
13. Denver Meat Company	H-77-1934	
14. Doranne of California, Inc., d/b/a Embassy Giftwares	77-H-724	
15. Douglas Furniture Corp.	H-78-54	

Plaintiffs	Civil Action Docket Numbers	Comments
16. Durawood Industries, Inc.	H-78-62	
17. Erie Seating Co. Rossville Packing Co.	H-78-68	
18. Furniture Plastics, Inc.	H-78-59	
19. Grist Mill Co.	H-77-849	
20. Haeger Potteries, Inc. Macomb Pottery Co., Inc.	H-77-1457	
21. Land O'Lakes, Inc.	H-78-170	
22. Levee Furniture Company	H-77-793	
23. Northland Aluminum Products, Inc.	H-78-171	
24. Marathon Enterprises, Inc. District Hotel Supply, Inc. Jefferson Orchards, Inc.	H-77-584	Plaintiff Pepsi-Cola Bottling Co. of Washington, D.C. Inc., to be dropped pursuant to Federal Rules of Civil Procedure 15 and 21.
25. Red Wing Industries, Inc.	H-77-804	
26. Salsburg Meats, Inc.	H-78-67	
27. Sambo's Restaurants, Inc.	H-78-63	
28. Scranton Royal Crown Bottling Co. Carl and Wallace Eisenstat, t/a Scranton Pepsi-Cola Bottling Co. I. Kaplan, Inc. Mid-Valley Packing Co., Inc. Golden Quality Ice Cream Co. Atlas Container Co., Inc.	78-375	Presently pending in E.D., but expected to be transferred to this Court as a tag-along action, pursuant to Rule 9 of Jud. P. on Mult. D. Lit.

Plaintiffs	Civil Action Docket Numbers	Comments
29. Shell-Tex Fisheries, Ltd.	H-77-876	
30. Snyder-Craft Co., Inc.	H-78-65	
31. Tierra Royal Potteries, Inc. Continental Nut Co.	H-77-2168	Plaintiff Continental Nut Co. is hereby added pursuant to Federal Rules of Civil Procedure 15 and 21.
32. Town House Furniture Ltd. Penthouse Furniture Ltd.	H-78-69	
33. Universal Cooperatives, Inc.	H-77-885	
34. Valley Avacodo Sales, Inc.	H-77-869	
35. Valley Plastics, Inc.	H-77-792	
36. West Publishing Company	H-77-791	
37. Westside Paper Company	H-78-48	
38. Williams Manufacturing Company Seneca Industries, Inc.	H-77-789	
39. Winona Industries, Inc.	H-77-814	
40. Wittek Golf Supply Co., Inc.	H-78-55	

EXHIBIT II

PLAINTIFFS AND CIVIL ACTIONS NOT INCLUDED WITHIN THIS UNIFIED AND CONSOLIDATED COMPLAINT

A. The Following Class Actions Are to be Dismissed Voluntarily Pursuant to Federal Rule of Civil Procedure 41(a):

Plaintiffs	Houston Civil Action Docket Numbers
1. Carnivale Bag Co., Inc.	H-78-61
2. Pepco Industries, Inc.	H-77-813
3. Steve Matson Products, Inc.	H-77-1991
4. Veneer Distributors, Inc.	H-78-66
5. Westbrae Natural Foods, Inc.	H-78-57

B. Non-Class-Actions Not Included:

Plaintiffs	Houston Civil Action Docket Numbers
1. ITT Continental Baking Company Pearson Candy Company The Paniplus Company ITT Gwaltney, Inc.	H-78-36
2. United Farmers Cooperative, Inc. Bookout & Mitchell Supply, Inc. Valley Farms, Inc. Griffin & Brand Sales Agency, Inc. Gateway Farms, Inc. International Frozen Foods, Inc.	H-77-2158
3. United Foods, Inc. John Inglis Frozen Foods Company Winter Garden, Inc. Dulany Foods, Inc. Nutritional Food Products, Inc. United Food Services, Inc. Trappe Frozen Foods Corporation	H-78-4

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. No. 310

IN RE: CORRUGATED CONTAINER
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

ALL ACTIONS EXCEPT:

FRANKLIN CONTAINER CORP., ET AL.
(C.A. No. H-78-671)

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR TENTATIVE APPROVAL OF PROPOSED PARTIAL SETTLEMENTS WITH DEFENDANTS INTERNATIONAL PAPER COMPANY AND ST. REGIS PAPER COMPANY

Filed December 4, 1978

Plaintiffs have entered into settlement agreements with defendants St. Regis Paper Company ("St. Regis") and International Paper Company ("International Paper"). Those agreements, which are memorialized in Exhibits A and B attached hereto, provide for a combined settlement principal of $10 million plus interest. Pursuant to Rule 23, plaintiffs have moved for tentative approval of these settlements, and plaintiffs submit this Memorandum in support of that motion.

I.

Summary of Settlement Terms

Pursuant to the St. Regis agreement, executed on July 21, 1978, that defendant has paid $1.7 million into

an escrow account, which is drawing interest at the rate of 8.6 percent per annum. Pursuant to the International Paper agreement, executed on August 25, 1978, International Paper has paid $8.3 million into an escrow account, which is now accruing interest at a rate in excess of 8.6 percent per annum. In addition, both agreements provide the following basic terms:

(1) Interest earned on the principal settlement sums will become and remain a part of the settlement fund, which may be used to defray expenses of this litigation.

(2) Each defendant consented to a settlement class as follows:

> All persons in the United States (excluding defendants and all subsidiaries and affiliates of defendants and all independent corrugated box manufacturers as defined in the Unified and Consolidated Complaint herein) who purchased corrugated containers or corrugated sheets from any defendant, or any subsidiary or affiliate of any defendant, at any time during the period from January 1, 1960, to January 25, 1978.

(3) Each defendant agreed to identify all class members who purchased corrugated containers and sheets from them to the extent such information is available.

(4) Each agreement provides that it shall not be construed to affect, in any manner, any joint or several liability of any non-settling defendant (*i.e.*, the settlements will not reduce the amounts otherwise recoverable from the non-settling defendants).

(5) The passage by Congress, subsequent to December 31, 1978, of any legislation (hereinafter "Illinois Brick" legislation) conferring standing on indirect purchases and allowing defendants to assert the pass-on defense as

to direct purchases (here the settling class), will not allow the settling defendants to rescind the settlement.

The International Paper Agreement obligates that defendant to cooperate fully with the designee of plaintiffs' Steering Committee in connection with these proceedings, including but not limited to specific items relating to documents, copies of grand jury transcripts, interviews and summaries of interviews with government attorneys, and depositions of officers, employees and agents, as more particularly set forth in Paragraph 15 of that agreement. Although the St. Regis agreement does not expressly set forth a similar provision, counsel for St. Regis agreed that his client would not oppose plaintiffs' request for access to transcripts of testimony of St. Regis employees, officers, or directors before the Federal Grand Jury in Houston and that he would furnish all documents provided to any government agency relating to the fungibility of corrugated containers.

II.

Standards Governing Preliminary Approval

At this stage, of course, plaintiffs seek only preliminary approval of these settlements. For these purposes, the Court need only be satisfied that the proposed settlements are "within the range of possible approval." See Manual for Complex Litigation, ¶ 1.46 (hereinafter "Manual"). The Manual further states:

> Such preliminary hearing is not, of course, a definitive proceeding on the fairness of the proposed settlement and the judge must be careful to make clear that the determination to permit the notice to be given to members of the class is not a finding that the settlement is fair and reasonable. On the contrary, he should make clear that it is simply a determination that there is in effect, "probable cause"

> to submit the proposal to members of the class and to hold a full scale hearing on its fairness at which all interested parties will have an opportunity to be heard after which a formal finding on its fairness will be made. *Id.*

This District Court has said that in assessing such settlements the Judge "shall examine the terms of the settlement and determine if the settlement appears reasonable on its face." *Magana* v. *Platzer Shipyard, Inc.*, 74 F.R.D. 61 (S.D. Tex. 1977).

Ultimately, of course, the Court must finally approve or disapprove the settlement. Recently, the Fifth Circuit reiterated the basis criteria for making that determination in the class action context:

> Settlement agreements are highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits. . . . In class actions this principal must be coupled with the two-fold requirement that (1) there is no fraud or collusion in arriving at the settlement and (2) the settlement is fair, adequate and reasonable. . . .

Miller v. *Republic National Life Insurance Co.*, 559 F.2d 426, 428-29 (5th Cir. 1977). The Fifth Circuit has also said: "Particularly in class action suits, there is an overriding public interest in favor of settlement." *Cotton* v. *Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977).*

The District Court has broad discretion in determining whether to approve a proposed class action settlement. In

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* The federal courts have long adopted a policy of encouraging and supporting the amicable resolution of litigation. *See, e.g., Williams* v. *First National Bank*, 216 U.S. 582, 595 (1910); *Florida Trailer Equipment Co.* v. *Deal*, 284 F.2d 567, 571 (5th Cir. 1960).

City of Detroit v. *Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974), the Second Circuit articulated the rationale for this role.

> Great weight is accorded . . . [the trial judge's] views because he is exposed to the litigants and their strategies, positions and proofs. He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly. *Id.* at 454.

In exercising that discretion, however, district courts need not, and indeed may not conduct a trial on the merits of the dispute, because "[t]he very purpose of compromise is to avoid the delay and expense of such a trial." *Young* v. *Katz*, 447 F.2d 431, 433 (5th Cir. 1971); *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 456 (2d Cir. 1974). As the Fifth Circuit aptly observed:

> [A settlement] could hardly be achieved if the test on hearing for approval meant establishing success or failure to a certainty. Parties would be hesistant to explore the likelihood of settlement apprehensive as they would then be that the application for approval would necessarily result in a judicial determination that there was no escape from liability or no hope for recovery and thus no basis for a compromise.

Florida Trailer Equipment Co. v. *Deal*, 284 F. 2d 567, 571 (5th Cir. 1960).

Recognizing that settlement represents an exercise of judgment by the negotiating parties, the courts have uniformly held that the judge reviewing the settlement should not resolve issues intentionally left unresolved or substitute his judgment for that of the negotiating parties. Rather, the courts have given considerable weight to the views of experienced counsel as to the merits of the settlement. *See Hinton, supra; Flinn* v. *FMC Corp.*, 528 F.2d 1169 (4th Cir. 1975); *State of*

W. Virginia v. *Chas. Pfizer & Co.*, 440 F.2d 1079, 1085 (2d Cir. 1971); *City of Detroit* v. *Grinnell Corp.*, 356 F. Supp. 1380, 1385 (S.D. N.Y. 1972). Indeed, according to the Fifth Circuit, absent fraud, collusion or the like, the trial judge should be hesitant to substitute his own judgment for that of counsel. *See Hinton, supra.*

III.

The Proposed Settlements Are Within The Range of Possible Approval

A. *The Instant Settlements Resulted From Good Faith, Arms' Length Negotiations.*

The Court should, of course, be satisfied that the settling parties have not entered into a "sweetheart settlement." *See Stull* v. *Baker*, 410 F. Supp. 1326 (S.D. N.Y. 1976), which emphasizes the importance of "zealously advocated, arms' length negotiations." When settlements are reached prior to class certification and thus prior to court appointment of class representatives, the court should be particularly mindful that the interests of the class were adequately represented. *See Ace Heating & Plumbing* v. *Crane Co.*, 453 F.2d 30 (1971).

Although the proposed settlements here were reached prior to class certification, that poses no problem whatsoever, since the negotiations were carried out with express approval of the Court and pursuant to procedures established in Pretrial Order No. 2, and in any event, counsel conducting the negotiations are now counsel for designated representatives of a class certified after an adversary hearing. Pretrial Order No. 2 established the Steering Committee, and authorized it to initiate and engage in all settlement negotiations with defendants.*

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* Pretrial Order No. 2 was entered on December 6, 1977, several months before settlement negotiations began.

Pursuant to that authority, the Steering Committee appointed an Ad Hoc Committee to conduct all settlement negotiations. In addition, before beginning negotiations with either St. Regis or International Paper, plaintiffs requested and received from the Court permission to institute settlement discussions. Moreover, plaintiffs' Steering Committee and all representatives for both container and sheet purchasers, approved the agreements.

Not only were the settlements effectuated in a manner sanctioned by the Court, the provisions thereof demonstrate the vigorous adversarial and arms' length nature of the negotiations. First, over strenuous objection by the settling defendants, plaintiffs insisted upon and received agreement that the settlements would not be contingent upon ultimate class certification. Thus, in effect, plaintiffs were able to guarantee members of the class a $10 million fund plus interest, regardless of the class determination outcome. Second, plaintiffs secured a provision, again despite resistance by International Paper and St. Regis, that their container and sheet sales would not be excluded from the sales upon which damages are calculated in this lawsuit. This means that the class will still be entitled to recover the entire overcharge from the remaining non-settling defendants. Also, though the settling defendants initially sought the right to opt out of the settlements in the event Congress passes Illinois Brick legislation prior to distribution of the settlement funds, plaintiffs, having reason to believe that this would not happen during the current session of Congress, insisted upon and obtained defendants' agreement that Illinois Brick legislation passed subsequent to December 31, 1978, would not provide defendants with a right to terminate the settlements. Finally, plaintiffs insisted on cooperation and discovery concessions that, in the case of International Paper, were accepted only with great reluctance and after several weeks of continuous negotiation.

Thus, the settling parties conducted negotiations according to guidelines and procedures established by the Court and with the Court's knowledge and permission. The Steering Committee and all plaintiffs' counsel approved the agreements prior to their execution. Finally, plaintiffs were able to secure key provisions of substantial benefit to the class that were strongly resisted by the defendants. Thus these settlements unquestionably resulted from good faith, arms' length negotiation.

B. *The Instant Settlements are Fair, Adequate and Reasonable.*

1. These Partial Settlements Will Not Reduce Any Ultimate Recovery On Behalf Of The Class.

In settling with St. Regis and International Paper, plaintiffs have obtained for the class payments of $10 million in principal that will accrue interest of over $800,000 per year until the settlement funds are disbursed. Not only does that monetary recovery represent a substantial benefit to the class, but importantly, it in no way limits any further recovery against the non-settling defendants, whether by way of settlement or jury verdict. The Manual points up the significance of that fact:

> The primary criteria for the court in evaluating the fairness and adequacy of a proposal is an informed estimate of the probabilities of both liability and damages. . . . Only by making such an estimate can a court decide whether the concrete present and future benefits held forth by the settlement without the expense and delay of trial and subsequent appellate procedures are worth *relinquishment* of plaintiff's claims. (emphasis added) (citing *Ace Heating & Plumbing Co.* v. *Crane Co., supra*).

Here, plaintiffs have not relinquished their claims at all. Both settlement agreements provide that the settling defendants' sales will not be excluded from the total sales upon which damages are to be calculated in this case. Thus plaintiffs are entirely free to recover the entire overcharge from any defendants who try this lawsuit. In effect, then, plaintiffs have gained $10 million plus interest and have given up nothing, as should be obvious from the number and combined net worth of the non-settling defendants.

A district court considered this very situation in *Wainwright* v. *Kraftco Corp.*, 50 F.R.D. 9 (N.D. Ga. 1973), and found the partial settlement to be fair, adequate, and reasonable. After noting that in a multi-defendant antitrust action, co-conspirators are jointly and severally liable for the entire amount of damages caused by their illegal acts, the court said:

> Keeping these principles in mind, the court concludes that the settlement does not work to the prejudice of the class. Since the remaining defendants named in this action will still be responsible for the entire amount of damages caused by Better Maid, if any, the class will sustain no economic loss by settling with Better Maid now. Indeed, if all the defendants but one settle with the class, the remaining defendants would still be liable for the damages caused by all. In sum, the settlement with Better Maid appears to the court as fair, adequate and reasonable as far as the plaintiff class is concerned. *Id.* at 11-12.

Thus, for this reason alone, the settlement should be preliminarily approved.

2. The Settlements Guaranteed The Class A Substantial Settlement Fund, Regardless Of The Outcome Of The Class Certification Decision Or Any Ultimate Merits Determination.

At the time of these settlements, this Court had not ruled upon plaintiffs' motion for class certification. Indeed, the settlements were reached after the Fifth Circuit decided *Alabama* v. *Blue Bird Body Co.*, 573 F.2d 309 (5th Cir. 1978), which defendants touted as the certain death knell for plaintiffs' class certification motion. Importantly, both agreements provided that neither would be contingent upon class certification. Hence, the settlements guaranteed the class $10 million plus interest against the risk of noncertification.

Moreover, whatever the outcome of this litigation on the merits, the class will still receive this settlement fund. Although plaintiffs believe this is an excellent case on liability and damages, litigants must always be mindful of Judge Wyatt's observation in the Antibiotics litigation:

> It is known from past experience that no matter how confident one may be of the outcome of litigation such confidence is often misplaced.

State of West Virginia v. *Chas Pfizer & Co.*, 314 F. Supp. 710, 743-44, *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied sub. nom. Cotter Drugs, Inc.* v. *Chas. Pfizer & Co.*, 404 U.S. 871 (1971). Interestingly, Judge Wyatt buttressed this point by noting two cases in which settlements were disapproved but in which the plaintiffs ultimately recovered less than the rejected settlement amount or lost on the merits. *See Piccard* v. *Sperry Corp.*, 36 F. Supp. 1006 (S.D. N.Y. 1971), *aff'd*, 120 F.2d 328 (2d Cir. 1941); *Upson* v. *Otis*, 155 F.2d 606 (2d Cir. 1946).

In this case, too, success cannot be foretold with certainty. Until the jury returns a verdict for plaintiffs and damages are assessed, risks will be ever present—the

law may take an unfavorable turn, the facts may not develop as expected, etc.* The instant settlements represent a hedge against those risks and a source of funding for continuing expenses.

Although plaintiffs did not have the benefit of merit discovery prior to entering the settlement agreements,** plaintiffs did have substantial factual materials upon which to make an informed judgment in weighing the benefits of the settlements at such time against the risks of further litigation. These materials included:

(a) The indictments and, in the case of International Paper, the extensive bill of particulars filed recently by the Government in the criminal case.***

(b) Documents produced by defendants to the Houston Grand Jury.***

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* For instance, Congress may well, during the pendency of this case, pass Illinois Brick legislation that might adversely affect the rights of direct purchasers to recover the entire overcharge resulting from defendants' activities. By removing that possibility with respect to St. Regis and International Paper, the settlements provide a very substantial benefit to the direct purchaser class, and the courts have recognized this benefit in assessing the reasonableness of settlements. *See e.g., In Re Anthracite Coal Antitrust Litigation,* 1978-2 Trade Cas. ¶ 62,292 (M.D. Penn. 1978).

** If it were necessary to engage in merit discovery before settling a class action, then no class action could ever be settled prior to certification, given the *Manual's* recommendation that merit discovery be stayed pending class certification. *See* Manual § 1.40. To the contrary, the *Manual* suggests the possibility of settlement prior to certification, *see* Manual § 1.21, and this Court has recognized that possibility. *See Magana* v. *Platzer Shipyard, Inc.,* 74 F.R.D. 61 (S.D. Tex. 1977).

*** To be sure, plaintiffs' review of the Grand Jury documents at the time of the International Paper settlement had been undertaken primarily for purposes of obtaining material

(c) Extensive memoranda and affidavits submitted by defendants in response to plaintiffs' class action motion.

(d) Motions and memoranda filed by defendants in the criminal case.

(e) Statistics of the Fiber Box Association relating to sales of corrugated containers and sheets.

(f) Arthur Andersen reports relating to economic conditions in the corrugated products industry.

(g) The opinion and record in *United States* v. *Container Corporation of America*, 393 U.S. 333 (1969), and the opinion in *United States* v. *Consolidated Packaging Corporation*, 575 F.2d 1171 (7th Cir. 1978).

In addition, plaintiffs were guided by the following concepts: First, where liability has not been established, single damages have been considered an appropriate method for evaluating a proposed settlement. The Second Circuit explained this principal in *City of Detroit* v. *Grinnell Corp.*, 494 F.2d 448, 458-459 (2d Cir. 1974):

> While it is true that treble damages are extracted from a Defendant who ultimately loses a civil antitrust suit on the merits, there are strong reasons why trebling is improper when computing a base recovery figure which will be used to measure the adequacy of a settlement offer. First, the vast majority of Courts which have approved settlements in this type of case, even though they may not have

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relevant to the class action hearing, and the bill of particulars had been filed only a few days prior to reaching agreement with International Paper as to the amount of its settlement. Nevertheless, the reasonableness of the instant settlements must be viewed in light of what plaintiffs knew at the time the agreements were entered. To hold otherwise, to assess the reasonableness of settlements in light of hindsight, would make it impossible to settle any class action.

> explicitly addressed the issue, have given their approval of settlements which are traditionally based on an estimate of single damages only . . . . Second, to argue that treble damages ought to be considered in a calculation of a base recovery range is to distort the entire theoretical foundation which underlies the settlement process. It requires Defendants to admit their guilt for the purpose of settlement negotiations. One of the underlying premises on which such negotiations are based, however, is that Defendants never have to concede their guilt. They can protest their innocence of any wrongdoing and assert that they are settling for purely pragmatic business reasons. To require treble damages to be considered as part of the computation of the base liability figure would force defendants automatically to concede guilt at the outset of negotiations. Such a concession would upset the delicate settlement balance by giving too great an advantage to the claimants—an advantage that is not required by the antitrust laws and one which might well hinder the highly favored practice of settlement.

Second, the four year statute of limitations has been utilized in judging the adequacy of an antitrust class settlement and, therefore, in developing a settlement formula. As noted by Judge Metzner in *City of Detroit* v. *Grinnell Corp., supra,* at 1386:

> . . . [I]n most of the settlements approved in other class action antitrust cases, the period has been 4 years which is the statute of limitations for such actions. . . .

Third, plaintiffs endeavored to develop a settlement formula bearing some relationship to the realities of the marketplace and the ability of defendants to respond in damages.

Fourth, early settling defendants should be entitled to a substantial discount, since early settlements encourage other defendants to come to the bargaining table, provide a source of funding for the litigation, and can assist plaintiffs' discovery program.

Operating within these general guidelines, the Steering Committee, using available information, calculated each settling defendant's approximate average percentage share of all defendants' container and sheet sales during the period 1972 through 1976. St. Regis accounted for approximately 3.97% of defendants' share of the market, and International Paper accounted for approximately 8.3%.

With respect to St. Regis, the first defendant to settle, after extensive negotiations the Steering Committee arrived at a minimum figure of $1.7 million, which was believed to be the maximum amount St. Regis would agree to pay prior to class certification, given the other terms of the settlement, particularly the *Illinois Brick* provision.

Subsequently, after extensive negotiations with International Paper, the Steering Committee determined to settle with that defendant for no less than $1 million per percentage point or $8.3 million, more than twice the amount per point paid by St. Regis. The higher amount was used because International Paper is a felony indictee, and was not the first defendant to settle.*

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* It should go without saying, of course, that plaintiffs are in no way bound by any formula or dollar figure per point used in these early settlements. Plaintiffs are entirely free, and indeed fully intend, to increase the minimum settlement amounts per market share point now that the class has been certified and merits discovery is underway.

3. Settling Defendants Agreed To Provide Substantial Discovery Help To Plaintiffs.

The settlement agreements are intended to provide plaintiffs with substantial cooperation and assistance from the settling defendants with respect to discovery material. In the absence of agreement, plaintiffs might never obtain some of this material or obtain it only after lengthy motion battles. By getting such materials at this stage, plaintiffs expect their discovery to be more efficient and effective against the non-settling defendants.

IV.

Conclusion

Plaintiffs are offering for the Court's approval only *two* settlements; thirty-five highly solvent corporate defendants remain. For several reasons, as discussed herein, plaintiffs are willing to settle with St. Regis and International Paper at substantially lower amounts than will be expected from the remaining defendants. These early settlements will not in any way affect the amounts recoverable from non-settling defendants.

Thus, for the reasons stated herein, plaintiffs respectfully urge that these settlements be tentatively approved, that the class be so informed, and that a date be set for

formal hearing on their fairness, adequacy, and reasonableness.

Respectfully submitted,

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By: /s/ *Stephen D. Susman*
STEPHEN D. SUSMAN
On Behalf Of Plaintiffs

[Certificate of Service omitted]

EXHIBIT A

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. No. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

This document relates to:

ALL ACTIONS EXCEPT
DRAPER-KING COLE, INC., ET AL.
(C.A. No. H-78-1226)
FRANKLIN CONTAINER CORP., ET AL.
(C.A. No. H-78-671)
IOWA BEEF PROCESSORS, INC., ET AL.
(C.A. No. H-78-1263)
ITT CONTINENTAL BAKING CO.
(C.A. No. H-78-376)
UNITED FARMERS COOPERATIVE, INC., ET AL.
(C.A. No. H-77-2158)
UNITED FOODS, INC., ET AL.
(C.A. No. H-78-4)

AGREEMENT OF SETTLEMENT WITH
DEFENDANT ST. REGIS PAPER COMPANY

WHEREAS, certain plaintiffs are prosecuting MDL No. 310 as a class action on behalf of themselves and other persons who were direct purchasers of corrugated containers and corrugated sheets as hereinafter defined:

WHEREAS, plaintiffs alleged that defendant St. Regis Paper Company (hereinafter "Settling Defendant") was a participant in an unlawful conspiracy to fix, raise,

maintain or stabilize the prices of corrugated containers and sheets and it has denied material allegations of plaintiffs' complaints and raised certain affirmative defenses thereto;

WHEREAS, Settling Defendant, denying wrongdoing of any kind whatsoever, has nevertheless agreed to enter into this Agreement of Settlement ("Agreement") to avoid further expense, inconvenience and the distraction of burdensome and protracted litigation;

WHEREAS, plaintiffs have conducted investigations into the facts of these cases, reviewed at length and analyzed the grand jury documents produced by the defendants, and have concluded that a settlement with Settling Defendant in the amount hereinafter set forth is in the best interests of plaintiffs and the class;

NOW, THEREFORE, it is agreed by and among the undersigned that these actions be settled and compromised with Settling Defendant, upon approval of this Court after a hearing as provided for herein, without affecting any joint and several liability of any non-settling defendant for any of the acts complained of by plaintiffs in any of their complaints, including, but not limited to, acts of Settling Defendant, on the following terms and conditions:

1. The undersigned counsel represent that they are fully authorized to enter into the terms and conditions of, and execute, this Agreement.

2. The undersigned agree to undertake their best efforts, including all steps and efforts contemplated by this Agreement, and any other steps and efforts which may become necessary by order of the Court or otherwise, to effectuate this Settlement and the Agreement.

3. Subject to the Court's approval and for the purposes of this Agreement only, the undersigned agree that there shall be designated the following Settlement Class in MDL No. 310:

"All persons in the United States (excluding defendants and all subsidiaries and affiliates of defendants and all independent corrugated box manufacturers as defined in the Unified and Consolidated Complaint herein) who purchased corrugated containers or corrugated sheets from any defendant, or any subsidiary or affiliate of any defendant, at any time during the period from January 1, 1960 to January 25, 1978."

4. The class shall be represented in MDL No. 310 by all parties in all cases to which this Agreement relates.

5. In full and complete settlement of the claims asserted in these actions against Settling Defendant and subject to the remaining provisions hereof, Settling Defendant shall deposit $1,700,000.00 in cash, in escrow, as described hereinafter, on or before the date of execution of this Agreement. Said amount and the interest thereon shall be referred to hereinafter as the "Fund." Except as otherwise expressly provided herein, Settling Defendant shall not be liable for any costs (including the costs of notice to class members) or attorneys fees, but all such costs and attorneys fees as approved by the Court shall be paid out of the Fund and interest earned thereon. In the event Settling Defendant requests notice of this Settlement to be sent to members of the class prior to general notice of certification to class members, Settling Defendant will pay the costs of such notice.

6. Settling Defendant agrees, at its cost, to identify all class members in MDL No. 310 who purchased corrugated containers and sheets (as identified in paragraph 3) from Settling Defendant to the extent that such information is available to Settling Defendant.

7. The Fund shall be invested in certificates of deposit in a bank by Stephen D. Susman and Vance K.

Opperman, or their designees, as escrow agents and attorneys for the class. Any interest earned on the Fund shall become and remain a part thereof.

8. The escrow agent and plaintiffs will be reimbursed and indemnified out of the Fund for all costs and expenses incurred in the administration and distribution of the Fund. Disbursements for such costs and expenses shall be made from time to time upon the approval of the Court. Settling Defendant shall have no responsibility with respect to the administration and distribution of the Settlement Fund except as expressly provided herein.

9. No distribution of the Fund shall be made until there has been approval of the Settlement in MDL No. 310, pursuant to Rule 23 of the Federal Rules of Civil Procedure, entry of a final judgment, the time for appeal has expired, and an Order of the Court allowing such distribution.

10. Upon such approval pursuant to said Rule 23, all claims as against Settling Defendant shall be dismissed with prejudice.

11. The Settlement shall not become effective unless the Settlement Class defined in paragraph 3 hereof is certified as to Settling Defendant pursuant to F.R.Civ.P. Rule 23(e) and this Settlement Agreement is approved in MDL No. 310 in all respects by the Court, and, in the event that the Court refuses to approve this Agreement or any material part of it, the entire Agreement shall become null and void unless all parties promptly agree to proceed with the Settlement as and if modified by the Court. In the event this Agreement becomes null and void for any reason, including, but not limited to, withdrawal by Settling Defendant, the Fund shall be disbursed to Settling Defendant, except that any costs of administering the Fund or this Settlement, exclusive of attorneys fees, shall first be deducted before the Fund is returned to Settling Defendant.

12. The fact of this Settlement with Settling Defendant shall not be construed to affect, in any manner whatsoever, any joint or several liability of non-settling defendants for the conspiracy and other acts alleged in the Complaints, including, but not limited to, any acts of Settling Defendant, any putative common law rule or practice, or state or local statute, to the contrary notwithstanding. Claimants upon the Settlement Fund prior to participation therein will execute and deliver covenants not to sue Settling Defendant on the checks or claim forms.

13. If within fifteen (15) days after the date fixed by the Court for members of the class to exclude themselves in MDL No. 310 pursuant to said Rule 23, Settling Defendant in its sole judgment, shall reasonably determine that requests for exclusions from the class have been made by potential class members representing significant purchases, this Agreement, at the option of Settling Defendant, shall be terminated. Such option shall be exercised, if at all, within such fifteen (15) day period by service of written notice of the election to withdraw on undersigned counsel by registered mail with a copy filed with the Court.

14. In the event that on or before December 31, 1978, Congress passes legislation which becomes effective, and which affects the potential rights of indirect purchasers in this litigation, Settling Defendant shall also have the option to terminate this Agreement unless a plan of allocation of the Fund among direct and indirect purchasers is developed to the satisfaction of all parties and approved by the Court within one (1) year after such legislation becomes effective. Said option shall be exercised, if at all, by service of written notice of the election to withdraw on undersigned counsel by registered mail with a copy filed with the Court.

15. This Agreement shall become effective upon its execution by the undersigned counsel.

MANDELL & WRIGHT
Stephen D. Susman, Chairman
Plaintiffs' Steering Committee
806 Main Street, 21st Floor
Houston, Texas 77002

DOUGHERTY, RUMBLE & BUTLER
Vance K. Opperman, Vice Chairman
Plaintiffs' Steering Committee
1500 First National Bank Building
St. Paul, Minnesota 55101

KOHN, MILSTEIN & COHEN
Jerry S. Cohen
1776 K Street, N.W.
Washington, D.C. 20006

CORINBLIT, SHAPERO & SELTZER
Jack Corinblit
3700 Wilshire Boulevard, Suite 820
Los Angeles, California 90010

COOPER & SCARPULLA
Joseph Cooper
300 Montgomery Street, Suite 600
San Francisco, California 94104

By: /s/ *Stephen D. Susman*
STEPHEN D. SUSMAN
On Behalf of Plaintiffs' Steering Committee and All Class Action Plaintiffs

LeBoeuf, Lamb, Leiby &
MacRae
H. Richard Wachtel
140 Broadway
New York, New York 10005

Akin, Gump, Hauer & Feld
Mayo J. Thompson
2800 Republican National
Bank Building
Dallas, Texas 75201

By: /s/ *H. Richard Wachtel*
H. Richard Wachtel
On Behalf of St. Regis Paper
Company

EXHIBIT B

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. No. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

This document relates to:

ALL ACTIONS EXCEPT
DRAPER-KING COLE, INC., ET AL.
(C.A. No. H-78-1226)
FRANKLIN CONTAINER CORP., ET AL.
(C.A. No. H-78-671)
IOWA BEEF PROCESSORS, INC., ET AL.
(C.A. No. H-78-1263)
ITT CONTINENTAL BAKING CO.
(C.A. No. H-78-376)
UNITED FARMERS COOPERATIVE, INC., ET AL.
(C.A. No. H-77-2158)
UNITED FOODS, INC., ET AL.
(C.A. No. H-78-4)

AGREEMENT OF SETTLEMENT WITH
DEFENDANT INTERNATIONAL PAPER COMPANY

WHEREAS, certain plaintiffs are prosecuting MDL No. 310 now pending before the above-entitled Court (hereinafter "the Court") as a class action on behalf of themselves and other persons who were direct purchasers of corrugated containers and corrugated sheets as hereinafter defined;

WHEREAS, plaintiffs alleged that defendant International Paper Company (hereinafter "Settling Defend-

ant") was a participant in an unlawful conspiracy to fix, raise, maintain or stabilize the prices of corrugated containers and sheets and it has denied material allegations of plaintiffs' complaints and raised certain affirmative defenses thereto;

WHEREAS, Settling Defendant, denying wrongdoing of any kind whatsoever, has nevertheless agreed to enter into this Agreement of Settlement to avoid further expense, inconvenience and the distraction of burdensome and protracted litigation;

WHEREAS, plaintiffs have conducted investigations into the facts of these cases, reviewed at length and analyzed the grand jury documents produced by the defendants, and have concluded that a settlement with Settling Defendant in the amount hereinafter set forth is in the best interest of plaintiffs and the class;

NOW, THEREFORE, it is agreed by and among the undersigned that these class actions be settled and compromised with Settling Defendant, upon approval by the Court, after a hearing as provided for herein, without affecting any joint and several liability of any non-settling defendant for any of the acts complained of by plaintiffs in any of their complaints, including, but not limited to, acts of Settling Defendant, on the following terms and conditions:

1. The undersigned counsel represent that they are fully authorized to enter into the terms and conditions of, and execute, this Agreement.

2. The undersigned agree to undertake their best efforts, including all steps and efforts contemplated by this Agreement, and any other steps and efforts which may become necessary by order of the Court or otherwise, to effectuate this Agreement and the settlement set forth herein.

3. Subject to the Court's approval and for the purposes of this Agreement only, the undersigned agree that there shall be designated the following Settlement Class in MDL No. 310:

> "All persons in the United States (excluding defendants and all subsidiaries and affiliates of defendants and all independent corrugated box manufacturers as defined in the Unified and Consolidated Complaint on file herein) who purchased corrugated containers or corrugated sheets from any defendant, or any subsidiary or affiliate of any defendant, at any time during the period from January 1, 1960 to January 25, 1978."

4. Said Settlement Class shall be represented in MDL No. 310 by all parties in all cases to which this Agreement relates.

5. In full and complete settlement of the claims asserted in these class actions against Settling Defendant and subject to the remaining provisions hereof, Settling Defendant shall deposit $8,300,000.00, in cash, in escrow, as described hereinafter, on or before the date of execution of this Agreement. Said amount and the interest thereon shall be referred to hereinafter as the "Fund". Except as otherwise expressly provided herein, Settling Defendant shall not be liable for any costs (including the costs of notice to class members) or attorneys fees, but all such costs and attorney fees as approved by the Court shall be paid out of the Fund and interest earned thereon. In the event Settling Defendant requests notice of this Settlement to be sent to members of the class prior to general notice of certification to class members, Settling Defendant will pay the costs of such notice.

6. Settling Defendant agrees, at its cost, to identify all class members in MDL No. 310 who purchased corrugated containers and sheets (as described in para-

graph 3 hereof) from Settling Defendant to the extent that such information is available to Settling Defendant.

7. The Fund shall be invested in certificates of deposit in a bank by Stephen D. Susman and Vance K. Opperman, or their designees, as escrow agents and attorneys for the class. Any interest earned on the Fund shall become and remain a part thereof. The Settling Defendant shall be advised with respect to the bank or banks issuing such certificates of deposit and the amount thereof and receive reports, on request, on the status of the Fund.

8. The escrow agent and plaintiffs will be reimbursed and indemnified out of the Fund for all costs and expenses incurred in the administration and distribution of the Fund. Disbursements for such costs and expenses shall be made from time to time upon the approval of the Court. Settling Defendant shall have no responsibility with respect to the administration and distribution of the Fund except as expressly provided herein.

9. No distribution of the Fund shall be made until the Court has approved this Agreement and the settlement set forth herein pursuant to Rule 23 of the Federal Rules of Civil Procedure, the entry of the Court's final order or judgment approving this Agreement and the settlement set forth herein and dismissing with prejudice the claims of the plaintiffs and the Settlement class members, the final affirmance on appeal of, or the final dismissal of an appeal from or the expiration (without the filing or noticing of an appeal) of the time to appeal from said final order or judgment, and an order of the Court allowing such distribution. Subject to the foregoing, (a) distributions from the Fund approved by the Court may be made to pay approved costs and expenses, past and future, incurred by the plaintiffs or plaintiffs' counsel in these MDL proceedings, (b) such distributions may be made from time to time on an interim

basis prior to the time when the remaining balance of the Fund may be distributed to Settlement class members, and (c) all such interim distributions shall be paid from the Fund only if authorized or approved by and upon the application of the Plaintiffs' Steering Committee and upon approval of the Court.

10. Upon the Court's approval of this Agreement and the settlement set forth herein, pursuant to said Rule 23, said final order or judgment shall be entered which shall provide that all claims of the plaintiffs and the members of the Settlement Class as against Defendant, which have been, are now or could be asserted in these actions and which relate to or arise out of the unlawful conspiracy to fix, raise, maintain or stabilize the prices of corrugated containers or sheets alleged in the Unified and Consolidated complaint on file herein, shall be dismissed with prejudice; *provided*, however, that said final order or judgment shall not be entered unless and until the time within which the Settling Defendant may withdraw from or terminate this Agreement and the settlement set forth herein pursuant to the provisions of paragraphs 13 or 14 has expired (without such withdrawal or termination having taken place).

11. The settlement set forth in this Agreement shall not become effective unless and until the Settlement Class defined in paragraph 3 hereof is certified as to the Settling Defendant pursuant to Rule 23(e) of the Federal Rules of Civil Procedure and this Agreement is approved in MDL No. 310 in all respects by the Court, and, in the event that the Court refuses to approve this Agreement or any material part of it, this entire Agreement shall become null and void unless all parties promptly agree to proceed with the settlement as and if modified by the Court. In the event this Agreement becomes null and void for any reason, including, but not limited to, withdrawal by Settling Defendant, the Fund shall be dis-

bursed to Settling Defendant, except that any costs of administering the Fund or the settlement set forth in this Agreement, exclusive of attorneys' fees, shall first be deducted before the Fund is returned to Settling Defendant.

12. The fact of this settlement with the Settling Defendant shall not be construed to affect, in any manner whatsoever, any joint or several liability of any of the non-settling defendants for the conspiracy and other acts alleged in the complaints, including, but not limited to, any acts of Settling Defendant, any putative common law rule or practice, or state or local statute, to the contrary notwithstanding. Claimants upon the Fund prior to participation therein will execute and deliver covenants not to sue Settling Defendant on the checks or claim forms.

13. If within fifteen (15) days after the date fixed by the Court for members of the Settlement Class to exclude themselves in MDL No. 310 pursuant to said Rule 23, Settling Defendant in its sole judgment, shall reasonably determine that requests for exclusions from the class have been made by potential class members representing significant purchases, this agreement, at the option of Settling Defendant, shall be terminated. Such option shall be exercised, if at all, within such fifteen (15) day period by service of written notice of the election to withdraw on undersigned counsel by registered mail with a copy filed with the Court.

14. In the event that on or before December 31, 1978, Congress passes legislation which becomes effective, and which affects the potential rights of indirect purchasers in this litigation, Settling Defendant shall also have the option to terminate this Agreement unless a plan of allocation of the Fund among direct and indirect purchasers is developed to the satisfaction of all parties and approved by the Court within one (1) year after such legislation becomes effective. Said option shall be exer-

cised, if at all, by service of written notice of the election to withdraw on undersigned counsel by registered mail with a copy filed with the Court.

15. Effective upon the execution of this Agreement by the undersigned counsel, Settling Defendant agrees to cooperate fully with the designees of Plaintiffs' Steering Committee in connection with each of the following matters:

(a) Settling Defendant agrees that, notwithstanding the entry of said final order or judgment, pursuant to paragraph 10 hereof, Settling Defendant shall continue to be considered a party defendant in these class actions for the sole purpose of discovery to be conducted pursuant to the Federal Rules of Civil Procedure;

(b) Settling Defendant agrees to retain, pending the final disposition of all cases involved in these MDL procedings, all documents or other evidence, if any, in its possession, custody or control, or in the possession, custody or control of its attorneys or other agents relating to the subject matter of these MDL proceedings, including but not limited to, copies of transcripts of the proceedings before the United States Grand Jury for the Southern District of Texas in its investigation of the corrugated container industry, interviews by Government attorneys taken in connection with said investigation, interviews of witnesses taken by or on behalf of Settling Defendant, and summaries thereof.

(c) Settling Defendant further agrees, upon request and subject to any orders of the Court, to promptly produce such documents or evidence to designees of Plaintiffs' Steering Committee. Provided, however, that if Settling Defendant has a

good faith reason to believe that any such evidence or document was obtained by it pursuant to a co-operative defense effort in the proceedings related to the corrugated container industry in the Southern District of Texas and that such evidence or document is protected by the attorney-client privilege or attorneys' work-product privilege belonging to a person or party other than Settling Defendant, then Settling Defendant may postpone production of such document or evidence for thirty (30) days following receipt of the request therefor if within ten (10) days of such receipt, Settling Defendant has given written notice of such request to such person or party and to Plaintiffs' Liaison Counsel, which notice shall have specifically identified the documents or evidence thought to be privileged. Thereafter, at the expiration of such thirty (30) day period, such document or evidence shall be produced unless the Court order otherwise. If any order of the Court bars Settling Defendant from producing any such documents or evidence, or if any person moves for the entry of such an order, Settling Defendant will take no position on any such motion or with respect to any application by plaintiffs to seek Court approval of the production by Settling Defendant of such document or evidence.

(d) Settling Defendant agrees, upon request by Plaintiff's counsel, to make its officers, employees and agents available, as witnesses at depositions at such places as may be designated by plaintiffs' counsel and at the trial of these actions, without regard to the territorial limitations of the process of the court where such proceedings may take place or the place where such person resides or is employed or transacts business.

(e) Nothing herein is intended: (1) to prevent any officer, employee or agent of Settling Defendant from asserting, where appropriate, any Fifth Amendment privilege against self-incrimination or any attorney-client privilege held by him in his individual capacity; (2) to require Settling Defendant to breach any attorney-client or attorney's work-product relationship it has entered into with any third party as a result of any co-operative defense effort in the proceedings related to the corrugated container industry in the Southern District of Texas; (3) to constitute a waiver by Settling Defendant of its attorney-client or attorney's work-product privilege as to any documents or evidence prepared or information obtained by Settling Defendant, subsequent to the execution of this Agreement, in connection with its defense in the criminal proceeding in the Southern District of Texas to which it is a party; (4) to require the disclosure of the impressions or thought processes of Settling Defendant's attorneys; (5) to extend to any non-parties to this Agreement the waiver by Settling Defendant provided for herein for the benefit of plaintiffs; or (6) to prevent plaintiffs from discovering any documents, evidence or information that would otherwise be discoverable under the Federal Rules of Civil Procedure.

16. Plaintiffs agree that, under present circumstances, they will not enter into a settlement of the class actions in MDL 310 with any similarly situated defendant that is more favorable to such defendant insofar as it relates to paragraph 14 or paragraph 5 of this Agreement without offering similar terms to Settling Defendant hereunder.

17. This Agreement shall become effective upon its execution by the undersigned counsel as of August 24, 1978.

MANDEL & WRIGHT
Stephen D. Susman, Chairman
Plaintiffs' Steering Committee
806 Main Street, 21st Floor
Houston, Texas 77002

DOHERTY, RUMBLE & BUTLER
Vance K. Opperman,
Vice Chairman
Plaintiffs' Steering Committee
1500 First National Bank
Building
St. Paul, Minnesota 55101

William Emerson Wright,
Plaintiff's Liaison Counsel
Niels Esperson Building
26th Floor
Houston, Texas 77002

By: /s/ *Stephen D. Susman*
STEPHEN D. SUSMAN
On behalf of Plaintiffs'
Steering Committee and All
Class Action Plaintiffs

DAVIS POLK & WARDWELL
Henry L. King
One Chase Manhattan Plaza
New York, New York 10005

BRACEWELL & PATTERSON
Joseph Jaworski
2900 South Tower
Pennzoil Place
Houston, Texas 77002

RICHARD M. MCCOSTIS
International Paper Company
220 East 42nd Street
New York, New York 10017

By: /s/ *Henry L. King*
HENRY L. KING
On Behalf of International
Paper Company

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. No. 310

IN RE: CORRUGATED CONTAINER
ANTITRUST LITIGATION

ALL ACTIONS EXCEPT

DEAN FOODS COMPANY, ET AL.,
(C.A. No. H-78-2004)
DRAPER-KING COLE, INC., ET AL.
(C.A. No. H-78-1226)
FRANKLIN CONTAINER CORP., ET AL.
(C.A. No. H-78-671)
IOWA BEEF PROCESSORS, INC.
(C.A. No. H-78-1263)
ITT CONTINENTAL BAKING CO., ET AL.
(C.A. No. H-78-376)
SUNMARK, INC.
(C.A. No. H-78-1815)
UNITED FARMERS COOPERATIVE, INC., ET AL.
(C.A. No. H-77-2158)
UNITED FOODS, INC., ET AL.
(C.A. No. H-78-4)

AFFIDAVIT ON BEHALF OF ST. REGIS PAPER COMPANY IN SUPPORT OF SETTLEMENT AGREEMENT

Filed December 4, 1978

State of New York)
: ss.:
County of New York)

H. Richard Wachtel, being duly sworn, deposes and says:

1. I am a member of the firm of LeBoeuf, Lamb, Leiby and MacRae of New York City, and one of the attorneys for defendant St. Regis Paper Company. I make this affidavit to provide certain of the background facts leading to the agreement of settlement between all class action plaintiffs in this litigation and St. Regis.

2. Although I have some recollection of conversations with members of the class plaintiffs' Steering Committee on the occasion of the first pre-trial conference in this action held before Honorable John V. Singleton on February 8, 1978, the first such communication reflected in my diary was a telephone conversation initiated by me on February 13, 1978 with Jerry Cohen, Esq., who among other things, advised me that Stephen Susman, Esq. was chairman of Plaintiffs' Steering Committee. My telephone conversation with Mr. Cohen was followed by telephone conversations with Mr. Susman on February 17 and February 21. In these telephone conversations, I pointed out that it was extraordinary for private treble damage actions based on federal criminal proceedings to be filed until indictments were returned; that the plaintiffs in these private treble damage actions had "jumped the gun" and had named as defendants all firms that had responded to grand jury subpoenas *duces tecum;* and that now that the grand jury had acted and the government had determined not to seek an indictment against St. Regis, suggested that plaintiffs should withdraw their action against St. Regis. I do not recall precisely what response was made to those remarks, but the conversation led to a discussion of the possibility of settlement with St. Regis.

3. During my discussion with Mr. Susman on February 21, he said that he had considered the matter of settlement with the Plaintiffs' Steering Committee, and they had determined that it was inadvisable to commence discussions on this subject until the Court was advised

that the parties intended to pursue them. I concurred, and we considered ways and means of so advising the Court. Accordingly, on February 22, a conference call to Judge Singleton was arranged in which Mr. Lezar of Mandell & Wright spoke on behalf of the plaintiffs, and I spoke on behalf of St. Regis. After hearing us, Judge Singleton stated that it was not inappropriate for the parties to consider settlement. There followed a series of telephone conversations with Jack Corinblit, Esq. (on March 7, March 9 and March 13) to set up a meeting for a settlement discussion with a delegation of Plaintiffs' Steering Committee. I recall that, in one of these conversations, Mr. Corinblit said something to the effect that St. Regis was the first plaintiff seeking such a meeting and the Committee expected that I would come to the meeting fully informed and would have with me appropriate market statistics.

4. On March 14, I met in a meeting room at O'Hare Airport in Chicago with Messrs. Cohen and Corinblit. My diary does not reflect the actual time spent at that meeting, but my recollection is that I had breakfast with Mr. Corinblit some time in mid-morning and then met with him and Mr. Cohen until late in the afternoon. Preliminarily there was a discussion of background facts regarding the industry and earlier investigations and litigation involving it. My client, St. Regis Paper Company, had been involved in many of these proceedings, and I described them briefly to Messrs. Cohen and Corinblit.

5. At the meeting, I described the trade association programs for reporting sales and production information and reviewed with them schedules which I had prepared showing the various defendants' share of market of corrugated products over the period January 1, 1970 through December 31, 1977. Attached as Exhibit A to this affidavit is a copy of the papers I had with me, all of which were made available to plaintiffs' counsel for

their inspection at that time. Before we left the hotel where the conference took place, Mr. Cohen made xerox copies of those sheets on a coin-operated machine.

6. In the course of describing the litigation involving the corrugated industry, I pointed out that, following the decision in *United States* v. *Container Corporation*, 393 U.S. 333 (1969) and the entry of an injunction by the District Court, St. Regis had put into effect a compliance program which had been carefully monitored so that none of the injunction's provisions would be violated and that, while the decree only applied to the Southeastern United States, St. Regis had decided in 1970 to apply it to its corrugated operations on a nation-wide basis. I was involved in many of the lecture sessions designed to instruct those St. Regis employees having pricing authority regarding the provisions of the decree. I told the plaintiffs' lawyers that I was informed regarding the St. Regis testimony before the Houston grand jury and that I was convinced that plaintiffs could not prevail in the action. The St. Regis documents which had been submitted to the grand jury and were later filed in the depository, pursuant to Pre-Trial Order No. 3 dated April 14, 1978, in my view, supported this position.

7. We turned to the amount of money St. Regis would be willing to pay to settle the case. In view of my conviction that St. Regis would prevail in the litigation, I thought the discussion ought to be conducted in terms of the prospective litigation expense to St. Regis on the one hand and, since St. Regis would be the first settling defendant, the support which such a settlement would give to the plaintiffs in their pursuit of other defendants. I was authorized at the time to settle for as much as $250,000 and, rather than dickering with the attorneys on the other side, offered the full amount. Messrs. Cohen and Corinblit retired from the meeting room for 20 minutes or half an hour and returned to advise me that my

offer was not acceptable. We continued our conversation, however, for about an hour and agreed that further discussions might prove to be useful. I recall that during that hour it was observed by either one of the plaintiffs' attorneys or by me that, if all the other unindicted container manufacturers who had been named as defendants in the treble damage suits settled on the same basis, a litigation fund for the pursuit of the claims against the indicted companies would be produced in the amount of approximately $2½ million. Messrs. Cohen and Corinblit emphasized that that was a ridiculously small amount, and I disagreed.

8. My next meetings with any of the plaintiffs' lawyers were informal talks with Mr. Susman in the lobby of the Shoreham American Hotel in Washington, D.C., on the occasion of the Spring Meeting of the Antitrust Section of the American Bar Association during the first week of April. Market information was not considered in these brief exchanges, but rather remarks that, on the one hand, the offer must be increased very substantially and responses, on the other, that the offer made was substantial given the extraordinary circumstances of the inclusion of St. Regis in the case.

9. My diary reflects telephone conversations with Mr. Corinblit on May 9 and with Mr. Susman on May 12. The latter led to a meeting with Messrs. Susman, Corinblit and Opperman at the offices of Mandell & Wright in Houston on May 15. At this meeting we again reviewed market share statistics and debated the amount of a St. Regis settlement in terms of St. Regis' willingness to go "a little higher" on the one hand and the plaintiffs' insistence that the number approach "seven figures".

10. Two days later, after a pre-trial conference held on May 17, I spoke with Messrs. Susman and Corinblit. By this time, pursuant to Pre-Trial Order No. 3, St. Regis had deposited all of the documents returned pur-

suant to the grand jury subpoenas *duces tecum*, no one of which suggested that St. Regis had participated in any conspiracy. In addition, the motion of the defendants in Crim. H-78-11 and in Crim. H-78-12 to dismiss the indictments on account of grand jury abuse, which included numerous exhibits going to the merits of the case, had also been filed. Nothing in that voluminous filing, either, demonstrated that St. Regis was involved in any conspiracy. I got the impression from those conversations that the plaintiffs felt more secure in their ability to prevail in the motion to certify classes and, for whatever reason, I was told that "the price has gone up" and, if St. Regis was serious about settlement, I would have to be authorized to deal with plaintiffs in terms of over a million dollars. After discussions with my client, I had a telephone conversation with Mr. Susman on May 24 in which I recall I indicated we should try once more to settle the case. We spoke on the telephone again on June 21.

11. My diary reflects a number of telephone calls with Mr. Susman and Mr. Cohen on June 26, and several conversations with Mr. Susman on June 27. During one of these conversations, I was advised by Mr. Susman that he had spoken with each member of Plaintiffs' Steering Committee, and that he had been instructed to present a "take it or leave it" offer to St. Regis of $1.7 million. This was not an effort to lend some weight to the "seven figure" concept earlier advanced at the meeting at Mandell & Wright on May 17th, or split the difference between a million dollars and the $250,000 which St. Regis had last offered. Mr. Susman made it clear that he wanted a "yes" or "no" answer, not a counteroffer. I undertook to provide him with one.

12. After meeting with members of my client's senior management and extensive discussions and debates as to what St. Regis' answer would be, and after discussions

with Mayo Thompson, Esq., St. Regis' trial counsel in this matter, it was finally decided that St. Regis would respond affirmatively to plaintiffs' offer. At the same time, it was decided that, if St. Regis would pay this amount of money, it should have a meaningful right to withdraw from the settlement both in the event of legislation repealing the decision in *State of Illinois* v. *Illinois Brick Company*, 431 U.S. 720 (1977), and also in the event that the Court failed to grant the contested motion to certify a class pursuant to Rule 23(c). St. Regis had the agreement of the plaintiffs, in the settlement of the *Fine Paper* treble damage actions against it pending in the Eastern District of Pennsylvania, that St. Regis could withdraw from the settlement in the latter event. I insisted that the same provision be included in a settlement agreement if one should be reached terminating the class plaintiffs' action against St. Regis in these corrugated container cases. During one of these discussions, I also indicated that we would want plaintiffs to agree to drop any damage claim against the other defendants based on purchases from St. Regis, *i.e.*, that St. Regis' sales should be excluded from the damage claims against other defendants.

13. These telephone conversations led to a meeting on July 6 at the offices of Wolf, Block, Schorr and Solis-Cohen in Philadelphia. There were present at the meeting Messrs. Susman, Kohn, Corinblit, Opperman, my partner, Grant Lewis, and myself. At that meeting, for the first time, new requests were made of St. Regis as a condition to a settlement of the case. First, we were asked to make available to plaintiffs' counsel the transcripts of testimony of St. Regis witnesses who appeared before the grand jury in Houston. In addition, we were asked to produce all documents furnished to any governmental agency suggesting that corrugated containers were fungible, a demand made in order to sustain plain-

tiffs' position that a nation-wide conspiracy of the product in question was feasible, which proposition they said might become important on the merits and might be relevant in the motion to certify class pursuant to Rule 23.

14. At that meeting we responded to the requests for grand jury testimony by indicating that my client would not stand in the way of such access. However, I told the group of plaintiffs' lawyers that only one St. Regis witness testified before the grand jury and that one had been interviewed and, to the extent that they could be made available, they would be produced. In telephone conversations a few days later, I advised Mr. Susman that the attorney representing those two St. Regis employees (Hugh Steger, Esq. of Dallas, Texas) was resisting the efforts of the defendants in the criminal cases to have the transcripts of these employees turned over for use in the defendants' motion to dismiss the indictments.

15. With respect to the request for documents furnished to any governmental agency, we undertook to make documents turned over by St. Regis to the Cost of Living Council available to the extent that they had been retained. We subsequently collected the Cost of Living Council materials and advised the plaintiffs' attorneys that they were available at our office for inspection and copying. We then turned to the conditions which would permit St. Regis to withdraw from the settlement. We negotiated at length about the timing of *Illinois Brick* legislation which would give rise to an "out" for St. Regis. Representatives of St. Regis had previously discussed this subject with Congressional Committee staff, and based upon what had been learned in these visits and from other sources, I advised the plaintiffs' group that it was our view that *Illinois Brick* legislation would not be passed during this term of Congress and that we needed protection against legislation through the end of

1979. They insisted that the matter could remain subject to a condition of this character only until the end of this year. We finally acceded to language which incorporated the plaintiffs' position.

16. We then discussed the right of St. Regis to withdraw from the settlement in the event the Court denied plaintiffs' motion to certify classes pursuant to Rule 23(c). We pointed out that we had obtained this type of agreement in the *Fine Paper* cases, but were adamantly resisted on this issue. After discussion with my partner, Grant Lewis, we returned to our discussions with the plaintiffs' lawyers and acceded to an agreement without this provision.

17. I had earlier indicated the probability that St. Regis would agree to a payment of $1.7 million but, at that time, stated my client's insistence upon settlement provisions granting a right to withdraw upon the happening of the conditions hereinabove described. In view of the counsel for plaintiffs' refusal to agree to these provisions and St. Regis' agreement to cooperate, to the extent indicated, the amount of payment was in my view still open for discussion. Rather than haggle about the amount, however, I told the group that I would recommend a settlement for $1.7 million on the basis reached at the meeting. Thereafter, on July 11, the matter was presented at a special meeting of the St. Regis Board of Directors at which Mr. Lewis and I appeared and spoke for approximately 2½ hours. I communicated St. Regis' authorization of the settlement to Mr. Susman who told me that he had to obtain approval from the attorneys in each of the actions filed on behalf of classes. This process took several days. I was then advised that each plaintiff's attorney had been called and the settlement was now authorized by every plaintiff. On July 20, St. Regis' check in the amount of $1.7 million payable to the order of Messrs. Susman and Opperman as Escrow

Agents and Attorneys for the Class was delivered to Mr. Susman, together with counterparts of the settlement agreement signed by me on behalf of St. Regis.

/s/ *H. Richard Wachtel*
H. RICHARD WACHTEL

Subscribed and sworn to before
me this 1st day of December,
1978.

/s/ [notary]

[Exhibit omitted]

[Certificate of Service omitted]

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. Docket No. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

This document relates to:

ALL ACTIONS EXCEPT THOSE
IDENTIFIED ON EXHIBIT II
ANNEXED TO THE UNIFIED AND
CONSOLIDATED COMPLAINT AND

DRAPER-KING COLE, INC., ET AL.
(C.A. No. H-78-1226)
FRANKLIN CONTAINER CORP., ET AL.
(C.A. No. H-78-671)
IOWA BEEF PROCESSORS, INC.
(C.A. No. H-78-1263)

MOTION FOR LEAVE TO FILE AMENDED ANSWER AND CROSS-CLAIM

Filed December 11, 1978

Defendant Westvaco Corporation ("Westvaco") hereby moves this Court for leave to amend its answer pursuant to Rules 13(g) and 15(a), Fed. R. Civ. P., to assert a cross-claim for contribution against defendants International Paper Company and St. Regis Paper Company, in the form attached as an appendix hereto, on the ground that justice so requires in order that all issues between the parties may be fully and efficiently litigated in this action.

This motion does not violate any limitation on time for filing imposed by the Local Court Rules of this Court or any special order of this Court in this litigation but the time for amending the Westvaco Answer as of right has expired.

On December 6 and 7, 1978 the undersigned counsel for Westvaco conferred in person by telephone with the following counsel for the following parties.

Counsel	Parties	Time
H. Richard Wachtel Grant S. Lewis LeBoeuf, Lamb, Leiby & MacRae	St. Regis Paper Co.	afternoon of Dec. 6 & 7
Henry L. King Davis, Polk & Wardwell	International Paper Co.	afternoon of Dec. 6 & 7
Stephen D. Sussman Mandell & Wright	Chairman, Plaintiffs' Steering Committee	morning of Dec. 6, afternoon of Dec. 7

All the above have informed Westvaco's Counsel that they intend to oppose this Motion.

Dated: December 7, 1978

SKADDEN, ARPS, SLATE, MEAGHER & FLOM

By /s/ *Leslie H. Arps*
LESLIE H. ARPS
919 Third Avenue
New York, New York 10022
Attorneys for Defendant
Westvaco Corporation

Of Counsel:

Thomas R. Long, Esq.
Ralph R. Ferney, Esq.

[Certificate of Service omitted]

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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IOWA BEEF PROCESSORS, INC.
(C.A. No. H-78-1263)

MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE AMENDED ANSWER AND CROSS-CLAIM

Defendant Westvaco Corporation ("Westvaco") seeks leave of Court to amend its Answer to the Unified and Consolidated Complaint to assert a cross-claim for contribution against defendants International Paper Company ("IP"), and St. Regis Paper Company ("St. Regis"). Westvaco's original Answer was filed on June 29, 1978.

Standards for Granting Leave to Amend

Rule 15(a) of the Federal Rules of Civil Procedure provides that leave of court is necessary where, as here,

a party's right to amend its pleadings as a matter of course has expired. The Rule provides that such leave "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a).

This standard for the granting of leave to amend has been reaffirmed by the Supreme Court in *Foman* v. *Davis*, 371 U.S. 178 (1962), where the Court stated:

> Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; . . . If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given." 371 U.S. at 182.

Although the grant or denial of leave to amend is within the discretion of the district court, refusal of leave to amend without justification is considered to be an abuse of discretion and inconsistent with the spirit of the Federal Rules. *Foman* v. *Davis*, *supra*, at 182. *Accord Sherman* v. *Hallbauer*, 455 F.2d 1236, 1242 (5th Cir. 1972); *Harkless* v. *Sweeny Independent School District of Sweeny, Texas*, 554 F.2d 1353 (5th Cir. 1977); *Hilgeman* v. *National Insurance Company of America*, 547 F.2d 298 (5th Cir. 1977).

I.

THE COURT SHOULD GRANT WESTVACO LEAVE TO AMEND ITS ANSWER

A. *Justice and Efficiency Require that Westvaco Be Allowed to Assert its Claim For Contribution.*

A claim for contribution against a co-defendant is properly brought as a cross-claim under Fed. R. Civ. P. 13(g).* 3 J. Moore, *Federal Practice* ¶ 13.34[1] (2d Ed. 1978). The rationale behind allowing cross-claims is set forth in Wright & Miller, *Federal Practice and Procedure*, as follows:

> [T]he general policy behind allowing cross-claims is to avoid multiple suits and to encourage the determination of the entire controversy among the parties before the court with a minimum of procedural steps. In keeping with this policy the courts generally have construed [Rule 13(g)] liberally in order to settle as many related claims as possible in a single action. Wright & Miller, *supra* at § 1431, at 161.

The cross-claim which Westvaco seeks to assert herein pertains directly to and arises from the action filed by the plaintiffs against the defendants. Although Westvaco emphatically denies that it has in any way violated the antitrust laws, it must protect itself from the risk, however remote, of being found liable to the plaintiffs and thereafter burdened with a disproportionate share of the

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* Rule 13(g) states in pertinent part:

> Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

liability asserted against the defendants jointly and severally. The cross-claim provides this protection.

Westvaco suggests that the Court should not rule upon the substantive merits of Westvaco's cross-claim for contribution at this time. Instead, Westvaco contends it should be allowed to assert its cross-claim in the instant action so that the Court may fairly and effectively adjudicate Westvaco's claim at the conclusion of the trial after it has heard all of the evidence. *See e.g., McLean* v. *Alexander*, 449 F. Supp. 1251 (D. Del. 1978).

Denying the cross-claim and relegating its substance to a new and separate action before a different court would involve an inordinate waste of time of the Court and the parties and would be unreasonably costly in terms of duplication in pleadings, discovery, trial time and the unnecessary expenditure of judicial effort in redetermining matters which have been already adjudicated.

Westvaco recognizes that the law is unsettled as to whether in an antitrust action contribution among defendants is proper. The United States Supreme Court has yet to address this issue and at the present time three cases are on appeal before the United States Courts of Appeals for the Fifth, Eighth and Tenth Circuits in which the question of the right to contribution among antitrust defendants is presented. *Abraham Construction Corp.* v. *Texas Industries, Inc.*, No. 78-1788 (5th Cir. docketed, April 14, 1978) (argued December 5, 1978), *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, No. 78-1229 (8th Cir. docketed March 30, 1978) (argued September 14, 1978); *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, No. 77-2068 (10th Cir. docketed December 20, 1977). Accordingly, Westvaco respectfully submits that the Court should not rule on the legal merits of its cross-claim for contribution while the law is so unsettled.

Should it be settled that contribution is proper, then this Court, having allowed Westvaco's cross-claim, will have retained jurisdiction over the settling defendants for the purpose of determining a just and equitable apportionment of the damages, if any, among those who are said to have caused the plaintiffs' alleged injuries in a single proceeding. In the meantime the settling defendants will not have been prejudiced by this Court now granting Westvaco's motion. It is clear that the interests of justice and judicial economy dictate that Westvaco's claim to contribution be ultimately adjudicated in this action and this can be accomplished most easily by granting Westvaco's motion to amend its answer.

B. *Grant of Leave to Amend Would in No Way Prejudice Any Other Party.*

Westvaco has acted promptly after learning of the putative settlements between plaintiffs and IP and St. Regis which involve the possible dismissal of said defendants from this action. There can be no prejudice to any other party to the action arising from Westvaco's amendment of its answer to assert the proposed cross-claim for contribution. Both IP and St. Regis remain party-defendants to several non-class actions which are part of MDL 310. Furthermore, pursuant to paragraph 15(a) of its proposed settlement, IP remains a party to all of the class action cases for discovery purposes. In addition, it would seem that St. Regis has agreed to participate on a limited basis in discovery in this action (See Memorandum In Support of Plaintiffs' Motion for Tentative Approval of Proposed Partial Settlements with Defendants International Paper Company and St. Regis Paper Company at p. 3). Thus, the assertion of Westvaco's claim will not require an expansion of discovery in MDL 310. Likewise, Westvaco's cross-claim does not affect the plaintiffs' choice of parties-defendant because it does not bring in any additional parties. Consequently

allowance of Westvaco's cross-claim will cause no delay in the time for trial.

II.

Conclusion

For the foregoing reasons, Westvaco respectfully submits that leave to amend its Answer to assert a cross-claim for contribution should be granted.

Dated: December 7, 1978

SKADDEN, ARPS, SLATE, MEAGHER & FLOM

By /s/ *Leslie H. Arps*
LESLIE H. ARPS, Esq.
919 Third Avenue
New York, New York 10022
(212) 371-6000
Attorneys for Defendant
Westvaco Corporation

Of Counsel:

Thomas R. Long, Esq.
Ralph R. Ferney, Esq.

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. No. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

This document relates to:

ALL ACTIONS EXCEPT THOSE
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FRANKLIN CONTAINER CORP., ET AL.
(C.A. No. H-78-671)
IOWA BEEF PROCESSORS, INC.
(C.A. No. H-78-1263)

AMENDED ANSWER AND CROSS CLAIM OF DEFENDANT WESTVACO CORPORATION TO THE UNIFIED AND CONSOLIDATED COMPLAINT

Defendant, WESTVACO CORPORATION ("Westvaco"), by its attorneys, Skadden, Arps, Slate, Meagher & Flom, answers the Unified And Consolidated Complaint (the "complaint") herein as follows:

1. Admits that the complaint purports to be a Unified And Consolidated Complaint pursuant to an Order of this Court filed on March 2, 1978 and the Stipulation dated May 16, 1978 and So Ordered on May 31, 1978

and denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 1 of the complaint.

2. Denies each and every allegation contained in Paragraphs 2, 3, 4, 10, 11, 12, 13, 17, 18, 19, 20, 21, 22, 23, 24 and 25 of the complaint.

3. Denies each and every allegation contained in Paragraph 5 of the complaint except admits that the actions identified in Exhibit I to the complaint were transferred to this Court from the districts in which they were commenced pursuant to 28 U.S.C. § 1407, and the Opinion and Order of the Judicial Panel on Multidistrict Litigation, dated November 29, 1977 (*In re Corrugated Container Antitrust Litigation*, 442 F. Supp. 921 (Jud. Pan. Mult. Lit. 1977)).

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 6 of the complaint except admits that the names listed in Exhibit I to the complaint purport to be the names of plaintiffs in this litigation.

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 7 and 9 of the complaint.

6. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 8 of the complaint except admits that Westvaco is a Delaware corporation with its principal place of business in New York, New York and is engaged in the business of manufacturing and selling corrugated containers and corrugated sheets in certain geographical areas of the United States.

7. Denies knowledge or information sufficient to form a belief as to the truth of allegations contained in Paragraphs 14 and 15 of the complaint and states that the

description of the trade and commerce in corrugated containers set forth therein is inaccurate and incomplete.

8. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 16 of the complaint except admits that Westvaco at various times during the period covered by the complaint has sold corrugated containers and corrugated sheets in certain geographical areas of the United States.

FIRST AFFIRMATIVE DEFENSE

9. The complaint fails to state a claim against Westvaco upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

10. The claims alleged in the complaint against Westvaco are barred in whole or in part by the applicable statute of limitations.

THIRD AFFIRMATIVE DEFENSE

11. Plaintiffs lack standing to assert a claim against Westvaco for damages or equitable relief.

FOURTH AFFIRMATIVE DEFENSE

12. The complaint does not allege an appropriate class action and this litigation is not maintainable as a class action.

FIFTH AFFIRMATIVE DEFENSE

13. Plaintiffs are not entitled to invoke the aid of any Court because they are guilty of unclean hands and have acted in bad faith.

SIXTH AFFIRMATIVE DEFENSE

14. Plaintiffs have been guilty of such laches as to preclude them from invoking the aid of any Court.

SEVENTH AFFIRMATIVE DEFENSE

15. The Court lacks jurisdiction over the person of Westvaco.

EIGHTH AFFIRMATIVE DEFENSE

16. Venue of this cause is improper.

CROSS-CLAIM AGAINST DEFENDANTS INTERNATIONAL PAPER COMPANY AND ST. REGIS PAPER COMPANY

17. Defendant International Paper Company ("IP") at all times mentioned in the complaint and in this answer was and is a corporation duly organized under the laws of the State of New York.

18. Defendant St. Regis Paper Company ("St. Regis") at all times mentioned in the complaint and in this answer was and is a corporation duly organized under the laws of the State of New York.

19. IP has entered into a proposed settlement ("IP Settlement") of the cause of action alleged in the complaint, which settlement is being submitted to the Court for approval. A copy of said IP Settlement is annexed hereto as Exhibit A and made a part hereof.

20. St. Regis has entered into a proposed settlement ("St. Regis Settlement") of the cause of action alleged in the complaint which settlement is being submitted to the Court for approval. A copy of the St. Regis Settlement is annexed hereto as Exhibit B and made a part hereof.

21. Under the terms of the IP and St. Regis Settlements the Court is being requested to dismiss the complaint against the said defendants IP and St. Regis and to permit these actions to proceed against all the other defendants including Westvaco.

22. With the possible exception of defendants IP and St. Regis, the said *Corrugated Container Antitrust Litigation*, MDL 310, as alleged in the complaints is continuing against the other defendants therein.

23. In the unlikely event that at the conclusion of the said *Corrugated Container Antitrust Litigation* judgment in an amount presently unknown should be entered against Westvaco, then Westvaco is entitled to receive appropriate contributions from the defendants IP and St. Regis.

24. By settling, as alleged in paragraphs 19, 20 and 21 hereof, defendants IP and St. Regis are attempting to avoid their obligations to make appropriate contributions to Westvaco as alleged in paragraph 23 hereof if after trial plaintiffs should obtain a judgment against Westvaco.

25. Westvaco has advised IP and St. Regis that it intends to hold IP and St. Regis liable for their appropriate contributions to Westvaco as set forth in this cross-claim and has demanded that IP and St. Regis should either participate in the trial of these actions, or be bound by the results thereof. Copies of the demands are annexed hereto and made a part hereof as Exhibits C and D respectively.

WHEREFORE, defendant Westvaco Corporation demands:

A. Judgment dismissing plaintiffs' complaint herein with prejudice together with the costs and disbursements of this action including reasonable attorneys' fees, and

such other and further relief as this Court may deem just and proper; and

B. Judgment against defendants IP and St. Regis (i) for their respective appropriate contributions to Westvaco in the event there is any liability to the plaintiff by Westvaco, (ii) for costs and disbursements of this cross-claim including reasonable attorneys' fees and (iii) for such other and further relief as this Court may deem just and proper.

Dated: December 7, 1978

SKADDEN, ARPS, SLATE, MEAGHER & FLOM

By /s/ *Leslie H. Arps*
LESLIE H. ARPS
919 Third Avenue
New York, New York 10022
(212) 371-6000

Attorneys for Defendant
Westvaco Corporation

Of Counsel:

Thomas R. Long, Esq.
Ralph R. Ferney, Esq.

[Exhibit A: Agreement of Settlement with Defendant International Paper Company. See Joint Appendix, pages 53-63.]

[Exhibit B: Agreement of Settlement with Defendant St. Regis Paper Company. See Joint Appendix, pages 46-52.]

EXHIBIT C

SKADDEN, ARPS, SLATE, MEAGHER & FLOM
919 Third Avenue
New York 10022

December 6, 1978

BY HAND

International Paper Company
220 East 42nd Street
New York, N.Y. 10017

Attention: William L. Lurie, Esq.
Vice President and
General Counsel

Dear Sirs:

This is to inform you that in the unlikely event a judgment should be entered against Westvaco Corporation in the actions entitled *In Re Corrugated Container Antitrust Litigation*, M.D.L. No. 310 now pending in the District Court of the United States for the Southern District of Texas, Houston Division, Westvaco will demand appropriate contribution from you.

In this connection on behalf of Westvaco we demand that you either participate in the trial of the above actions if one is required or be bound by the results thereof.

Very truly yours,

Leslie H. Arps
Counsel for
Westvaco Corporation

cc: Henry L. King, Esq.
Thomas R. Long, Esq.

EXHIBIT D

SKADDEN, ARPS, SLATE, MEAGHER & FLOM
919 Third Avenue
New York 10022

December 6, 1978

BY HAND

St. Regis Paper Company
150 East 42nd Street
New York, N.Y. 10017

Attention: Homer Crawford, Esq.
Vice President and
Secretary

Dear Sirs:

This is to inform you that in the unlikely event a judgment should be entered against Westvaco Corporation in the actions entitled *In Re Corrugated Container Antitrust Litigation*, M.D.L. No. 310 now pending in the District Court of the United States for the Southern District of Texas, Houston Division, Westvaco will demand appropriate contribution from you.

In this connection on behalf of Westvaco we demand that you either participate in the trial of the above actions if one is required or be bound by the results thereof.

Very truly yours,

Leslie H. Arps
Counsel for
Westvaco Corporation

cc: H. Richard Wachtell, Esq.
Thomas R. Long, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. No. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

This Document Relates to:

ALL ACTIONS

SUPPLEMENTAL MEMORANDUM OF CERTAIN DEFENDANTS IN SUPPORT OF THEIR MOTION FOR A PROTECTIVE ORDER PROHIBITING DISCLOSURE OF PRIVILEGED DOCUMENTS OR INFORMATION

I. *Preliminary Statement*

This memorandum is filed on behalf of the undersigned defendants ("non-settling defendants") in support of their Motion for a Protective Order Prohibiting Disclosure of Privileged Documents or Information. After that motion and a supporting memorandum were filed, other papers were filed by various parties with respect to the principal subject matter of the motion, paragraph 15 of the class action plaintiffs' Agreement of Settlement with Defendant International Paper Company ("I.P. Settlement Agreement"). Additionally, the plaintiffs have sought to implement the discovery procedures contained in paragraph 15, thereby confirming the obvious need for relief from this Court to protect non-settling defendants' rights. In light of the various papers that have been filed and the events surrounding the initial effort by the plaintiffs to invoke the provisions of paragraph 15, non-settling defendants have attached to this memorandum as Appendix A a proposed protective order that

they believe should be entered. This memorandum is submitted to clarify for the Court the very limited relief that non-settling defendants seek by their motion for a protective order and to respond to the papers that have been filed.[1]

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[1] Attached to non-settling defendants' motion for a protective order was a proposed order that was believed at that time to be necessary and appropriate to protect the rights of non-settling defendants. That proposed order was designed essentially to require that, notwithstanding the provisions of paragraph 15, there would be no disclosure of documents or information by I.P. to the plaintiffs if such materials were subject to a privilege belonging to a third party or parties, including non-settling defendants, without their consent. Non-settling defendants still believe that such an order would be appropriate in the circumstances. It is believed, however, that the proposed order submitted with this memorandum is perhaps more desirable in light of the events that have occurred since the filing of the motion for a protective order and should not be objectionable to the plaintiffs or to I.P. for any legitimate reason.

The settlement agreement previously entered into by St. Regis Paper Company does not contain a provision comparable to paragraph 15 of the I.P. Settlement Agreement. Nevertheless, St. Regis apparently has made some agreements with the plaintiffs regarding production of documents or other materials by St. Regis. *See* Affidavit on Behalf of St. Regis Paper Company in Support of Settlement Agreement ¶¶ 13-15; Memorandum in Support of Plaintiffs' Motion for Tentative Approval of Proposed Partial Settlements with Defendants International Paper Company and St. Regis Paper Company at 2-3, 7. Accordingly, although paragraph 15 provided the initial impetus for the filing of non-settling defendants' motion, the proposed order attached to this memorandum relates not only to discovery from I.P. but also to discovery requests directed to any defendant in addition to I.P. that has entered into, or may enter into, a settlement arrangement with any plaintiff in MDL No. 310.

In essence, the proposed protective order attached to this memorandum would require first that all defendants be given notice by plaintiffs immediately upon their serving any request upon a settling defendant for the production of documents or other materials by requiring service upon all defendants of a copy of any such request. The settling defendant would be required to segregate from the materials it believes are responsive to the request all of the documents or other materials it believes are subject to a privilege or immunity from disclosure that belongs to any third party, or that may contain information subject to any such privilege or immunity, as well as other documents or materials that were generated in connection with joint-defense efforts in these or other proceedings. As soon as the settling defendant has segregated these materials, it would then be obligated to give notice of that fact to the other defendants, who then would be given an opportunity, within ten days from the receipt of such notice, to inspect the segregated materials and to advise the settling defendant that they object to the production of specified documents or materials. The specified materials would not be produced, but rather would be retained by the settling defendant, appropriately identified, in the event that their production is later sought by a motion to compel discovery.[2] Under this procedure, there would be no delay of production of any documents or materials that were generated in the ordinary course of business by officers or

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[2] This procedure also would provide that the identity of such documents, the production of which has not been made because of a third-party objection, may not be disclosed to plaintiffs by the settling defendant, its counsel or its officers and employees, either in other discovery or by any other means, except in a manner to which the objecting party has consented. Any dispute regarding this procedure can be brought to the Court's attention by means of a motion to compel discovery.

employees of the settling defendant and that were not generated in connection with or in relation to any joint-defense efforts in these or other proceedings.

Essentially, what the proposed protective order would do is to provide nothing more than a fair opportunity for non-settling defendants to review a very limited portion of any production proposed to be made by a settling defendant, thereby ensuring that privileged material will not be inadvertently disclosed. In contrast to the important rights of non-settling defendants that are placed in jeopardy if no such procedure is adopted, the suggested procedure does not work to the detriment of the plaintiffs or the settling defendant. The minimal delay encountered by plaintiffs surely cannot impair in any way their ability to prosecute their cases, as, even with the request already made of I.P., production could be accomplished prior to production by non-settling defendants pursuant to plaintiffs' requests that have been made under normal discovery procedures. Similarly, the documents to be reviewed by non-settling defendants would be those that the settling defendant had a reasonable basis for believing might be subject to a privilege or immunity from production belonging to a third party or parties. All non-settling defendants would receive is merely an opportunity to review them either to confirm the settling defendant's judgment that these documents or materials in fact are subject to the privilege or privileges of another, or to advise the settling defendant that no privilege can or will be asserted. All that is proposed, therefore, is a fair opportunity to assert important rights that otherwise could be irreparably damaged.

Non-settling defendants submit that the reasonableness of this approach simply cannot be questioned, in light of significance of the joint-defense doctrine in this litigation. As stated in non-settling defendants' initial memorandum in support of their motion for a protective

order, the *Manual for Complex Litigation* stresses the importance of joint-defense efforts in complex litigation and, more important, that participation in such efforts shall not be considered as a waiver of privileges belonging to the participants. *Manual for Complex Litigation* § 1.92 (1977). This Court, moreover, has recognized the importance of this principle, particularly in Pretrial Order No. 3, which expressly provides that participation by counsel in joint-defense efforts "shall not be construed as a waiver of any attorney-client, work product or other privilege." Pretrial Order No. 3 at 9-10.

The significant policies underlying this rule cannot be overlooked. The elimination of duplicative efforts by numerous parties who share common interests necessarily requires that consultation relating to their collaborative efforts must be capable of being carried out free of the fear that the content of such communications might be disclosed to opposing litigants. Were it not for this protection, such efforts would become, as one court has described it, an "improbable alternative".[3] The multiplicitous and uncoordinated efforts of the dozens of parties in MDL No. 310 that would result from a breakdown of joint-defense efforts provides the clearest evidence of the importance of the rule of confidentiality that non-settling defendants seek to protect.

Beyond this the non-settling defendants will not restate in this memorandum the arguments and authorities set forth in their initial memorandum, which amply support the relief requested. Rather, the following section of this memorandum describes pertinent matters that have occurred since the non-settling defendants' motion was filed. Section III of this memorandum considers certain of the plaintiffs' contentions to which non-settling defendants

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[3] *In re Grand Jury Subpoena Duces Tecum Dated November 16, 1974*, 406 F. Supp. 381, 394 (S.D.N.Y. 1975).

believe a response is necessary. Non-settling defendants believe that, particularly in the context of this background, the limited relief they seek clearly is appropriate.

II. *Pertinent Facts*

Paragraph 15, after obligating I.P. to retain all documents or other evidence in its possession, custody or control or in the possession, custody or control of its attorneys or other agents relating to the subject matter of MDL No. 310 (I.P. Settlement Agreement ¶ 15(b)), requires I.P., upon request, "to promptly produce such documents or evidence" to plaintiffs (*id.* ¶ 15(c)). This provision, however, also contemplates that some of such documents and evidence would be subject to a privilege belonging to persons or parties other than I.P., by providing:

> . . . if [I.P.] has a good faith reason to believe that any such evidence or document was obtained by it pursuant to a co-operative defense effort in the proceedings related to the corrugated container industry in the Southern District of Texas and that such evidence or document is protected by the attorney-client privilege or attorneys' work-product privilege belonging to a person or party other than [I.P.], then [I.P.] may postpone production of such document or evidence for thirty (30) days following receipt of the request therefor if within ten (10) days of such receipt, [I.P.] has given written notice of such request to such person or party and to Plaintiffs' Liaison Counsel, which notice shall have specifically identified the documents or evidence thought to be privileged. Thereafter, at the expiration of such thirty (30) day period, such document or evidence shall be produced unless the Court order [sic] otherwise. If any order of the Court bars [I.P.] from producing any such documents or evidence, or if any person

> moves for the entry of such an order, [I.P.] will take no position on any such motion or with respect to any application by plaintiffs to seek Court approval of the production by [I.P.] of such document or evidence.

I.P. Settlement Agreement ¶ 15(c).

That this purported attempt to protect the rights of others falls far short of what is required in the circumstances is self-evident on the face of this contractual language. Thus, I.P. *may* produce all documents and other information, even if subject to the privilege of another, without any notice to those parties to whom the privilege belongs. Moreover, I.P. *is required* to do so *without objection* unless the holders of the applicable privilege are able promptly to obtain a court order prohibiting production after having been notified of I.P.'s belief that the material requested is protected by a privilege belonging to them. The protection of important privileges thus is left subject not only to the exercise of discretion by I.P. and its counsel, parties to whom the privileges in question do not belong, but also to the exigencies of a possible hurried effort to seek court protection in the face of threatened and imminent production.

But the inherent defects in this provision are best evidenced by the plaintiffs' first attempt to invoke the procedures that paragraph 15 would make available to them.[4] By letter dated October 4, 1978, from Henry L.

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[4] This Court, of course, has recognized that such an attempt to seek production of documents was premature because the I.P. Settlement Agreement has not been approved by the Court. *See* Transcript of October 17, 1978, Pretrial Conference at 181-90. Nevertheless, that effort by plaintiffs, as well as their later motion to seek production of documents from I.P. that, they assert, are not even "arguably subject" to a

King, counsel for I.P., the non-settling defendants were advised for the first time that a voluminous request for production of documents had been served on I.P. by plaintiffs on September 29, 1978, purportedly pursuant to paragraph 15 of the I.P. Settlement Agreement.[5] The plaintiffs' September 29 request to I.P. sought production of documents described in a total of 54 paragraphs, and this voluminous production was requested to be made within 14 days of the request.

The stated purpose of the letter from Mr. King was to notify plaintiffs and the non-settling defendants, pursuant to paragraph 15(c) of the I.P. Settlement Agreement, that I.P. and its counsel had reason to believe that some of the material requested by plaintiffs was obtained pursuant to a cooperative defense effort and subject to the attorney-client or attorney's work-product privileges of defendants or parties other than I.P. By the time this "notice" from Mr. King was sent to (not received by) the non-settling defendants, however, more than one-third of the brief 14-day period of time for the requested production already had elapsed.[6] Moreover, this letter described

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privilege of any party other than I.P., makes it clear that a protective order now is necessary to prevent possibly irreversible breaches of important confidences as well as potential disruption of the orderly handling of this litigation.

[5] The September 29 request and Mr. King's October 4 letter are attached as Exhibits B and C, respectively, to the Response of International Paper Company to Motion for Protective Order Prohibiting Disclosure of Privileged Documents or Information ("I.P. Response").

[6] Additionally, although paragraph 15(c) provides that, if I.P. gives notice to plaintiffs and non-settling defendants pursuant to that paragraph, I.P. *may* postpone production for up to 30 days, such a postponement occurs only if I.P. decides to do so. There was no indication in Mr. King's letter, however, that the requested production would be made on a schedule other than as requested by plaintiffs.

the material I.P. believed to be privileged merely by stating that the material requested by certain paragraphs of the request is or may be subject to attorney-client or work-product privileges of parties other than I.P. In fact, regarding several paragraphs of the request, Mr. King's letter stated that documents responsive to such paragraphs might exist that are subject to such privileges, but that, "[i]n the very short time period since receipt of Plaintiffs' Letter, we have not had an opportunity to review IP's files to determine whether there are any documents responsive to such requests."[7]

On October 13, 1978, Mr. King wrote to plaintiffs regarding the September 29 production request, to set forth certain objections of I.P. to the production of some of the requested material.[8] In this letter Mr. King stated I.P.'s recognition that there were materials in its possession

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[7] Although paragraph 15(c) of the I.P. Settlement Agreement provides that notice pursuant to that paragraph shall "have specifically identified" the materials about which such notice is given, such specificity was lacking in Mr. King's letter, to the detriment of the non-settling defendants. Hence, the non-settling defendants were placed in a position of having to seek court protection to preserve important confidences that might exist without even knowing precisely what documents or materials were involved. The non-settling defendants do not fault Mr. King for failing to provide such specificity about such a voluminous request in such a short period of time; rather, this serious deficiency is compelling evidence of the totally improper and unworkable attempt in paragraph 15(c) to protect the rights of others that are so clearly affected by that paragraph. Moreover, as will be demonstrated, specific notice *to plaintiffs*, as is seemingly called for by paragraph 15(c), is itself improper and could jeopardize the rights of non-settling defendants. *See* nn 17-18 *infra*.

[8] Mr. King's October 13 letter is attached as Exhibit D to the I.P. Response.

that were subject to privileges belonging to parties other than I.P. or that were subject to other restrictions upon their production.[9]

After the filing of non-settling defendants' motion for a protective order and after the plaintiffs' September 29 request, both plaintiffs and I.P. filed separate papers responding to non-settling defendants' motion.[10] In essence, I.P. stated that the pertinent portions of paragraph 15 are clear and that non-settling defendants have misinterpreted that agreement. By contrast, the plaintiffs,

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[9] Mr. King's letter stated in pertinent part:

> At the outset, we wish to call to your attention the fact that among the pre-trial orders entered by the Court in the Houston corrugated proceedings there are three such orders that restrict production of some of the requested materials. The Interim Protective Order entered by the Court in the Houston criminal cases on April 3, 1978 restricts the dissemination of all documents or the contents thereof which were placed in the government document depository established in those cases to counsel, parties, and officers or employees of parties required to work directly on those cases. All transcripts of grand jury and grand jury interview testimony in the possession of IP or its counsel given in the investigation of the corrugated container industry were placed in the document depository by the government pursuant to Pre-trial Order No. 2 in the Houston criminal cases dated April 6, 1978, and thus are subject to the restrictions of the Interim Protective Order. In Pre-trial Order No. 3 entered in M.D.L. 310, the Court instructed the defendants to enter into a cooperative defense relationship, with the specific provision that any cooperative defense effort would not be construed as a waiver of an attorney-client, work-product or other privilege.

[10] I.P. Response; Memorandum in Opposition to Motion by Non-settling Defendants for Protective Order ("Plaintiffs' Memorandum").

while failing to set forth any significant reasons for denying protection of important rights of non-settling defendants, make the incredible contention that, notwithstanding any possible claim of privilege, I.P. should be allowed "voluntarily" to produce any documents it may wish to turn over to the plaintiffs even if I.P.'s counsel is precluded from doing so. Plaintiffs' Memorandum at 8-16. Hence, while I.P. exhorts non-settling defendants to rely upon the supposed clarity of the pertinent provisions of the I.P. Settlement Agreement and I.P.'s representations that it did not intend, by agreeing to the provisions of paragraph 15, to "waive" any privileges belonging to non-settling defendants,[11] the plaintiffs simultaneously assert that I.P. is under no duty to protect confidences shared with it if it "voluntarily" elects not to do so, and that, in stark contrast to I.P.'s assertions, "IP has effectively and properly waived either the attorney-client or attorney work product privilege that otherwise may have attached . . . ." Plaintiffs' Memorandum at 16-17.

III. *Neither I.P. Nor Its Counsel May, Voluntarily or Otherwise, Produce Privileged Documents and Information Obtained by Them Pursuant to Joint-Defense Efforts.*

Although non-settling defendants believe that there can be no question about the need for the protective order requested, we feel compelled to respond to certain of the patently erroneous contentions that plaintiffs have made in their attempt to question a rule of confidentiality the

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[11] Although I.P. speaks of its intention not to "waive" the privileges of others, it is important to remember that the privileges in question are not I.P.'s to waive. Rather, I.P. is in the position of one duty bound to maintain the confidence entailed by a privilege unless the party or parties to whom it belongs choose to waive it.

existence of which this Court and all of the parties, including plaintiffs, have recognized throughout this litigation. In substance, the plaintiffs contend that I.P. voluntarily may disclose documents and other information that have come into its possession pursuant to joint-defense efforts among I.P. and others notwithstanding that such materials may be subject to privileges belonging to others.[12] Thus they first imply broadly that communications by codefendants in the presence of both I.P. and attorneys are not subject to an enforceable privilege, presumably because I.P., as distinguished from its attorneys, was a direct recipient of such communications. Plaintiffs' Memorandum at 8-9. Plaintiffs' statement that "this appears to be a question of first impression" shows not that there is an absence of case law on the question but rather that plaintiffs apparently have not read the cases cited in their own memorandum. To the contrary, in several of the reported cases dealing with the joint-

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[12] Although the plaintiffs state in their memorandum that non-settling defendants are seeking "extraordinary" relief and that the protection they seek is unduly broad (Plaintiffs' Memorandum at 1, 5-7), it is the plaintiffs' contentions that properly may be characterized as overbroad. For example, plaintiffs assert that "one reading of defendants' motion suggests that defendants would bar disclosure of direct communications between IP and any of the attorneys involved in these proceedings." *Id.* at 7. To the extent that privileged communications originated from I.P. and consisted of material or information, subject to a privilege belonging solely to I.P., that I.P. was making available to others pursuant to a joint-defense effort, non-settling defendants surely do not question I.P.'s right, if it so chooses, to waive its privilege and to make such material available to the plaintiffs. But the glossing over of this narrow category of materials by the use of the far broader term of "communications between IP and any counsel" clearly overlooks communications of which I.P. is the recipient and as to which a privilege of a party other than I.P. may apply.

defense doctrine, courts have held that applicable privileges were not waived in a joint-defense context even when the privileged matter in question was disclosed in the presence of the parties involved in the joint-defense efforts. *E.g.*, *Hunydee* v. *United States*, 355 F.2d 183, 184-85 (9th Cir. 1965); *In re Grand Jury Subpoena Duces Tecum Dated November 16, 1974*, 406 F. Supp. 381, 386-89 (S.D.N.Y. 1975). Indeed, the supposed significance of the presence of counsel to the joint-doctrine is totally dispelled by the facts of *Grand Jury*, in which the court held that there was no waiver of applicable privileges with respect to meetings at which some codefendants were present without their counsel. 406 F. Supp. at 391.

Plaintiffs, however, seek to impose upon this authority an additional requirement that, for the joint-defense doctrine to remain intact, the parties who receive such confidential communications must remain willing to maintain the confidences reposed in them. They thus seek to distinguish between a *party* recipient and an *attorney* recipient of joint-defense communications, recognizing that the latter has a fiduciary duty not to breach the confidences reposed in him while contending that the former does not. Yet plaintiffs set forth no reasons why the fiduciary relationship arising in connection with joint-defense efforts is any less significant or less worthy of preserving because it arises between coparties rather than between a party and the counsel for a coparty.[13] In

[13] Although plaintiffs state that an attorney-recipient of such communications may, of course, have ethical obligations that prohibit disclosure, whether voluntary or otherwise, they also recognize that the basic underlying obligation in connection with joint-defense efforts arises from a "fiduciary relationship". Plaintiffs' Memorandum at 11-12. A fiduciary relationship, however, surely does not require that one of the parties to the relationship be an attorney. Rather, fiduciary

substance, plaintiffs' only asserted reason for drawing this distinction is that non-settling defendants supposedly must assume the risk "with respect to the . . . loyalty of their companions." Plaintiffs' Memorandum at 12. Yet it is in situations where there could be some question about the sanctity of a fiduciary's undertaking to maintain shared confidences that the obligations arising therefrom are most in need of preservation by the courts.[14]

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duties are imposed by the law where, either because of the parties' agreement or because of other special circumstances, there is a need to exact a standard of conduct from someone that is perhaps higher than that which would be required were it not for those special circumstances. I.P.'s status as a non-attorney cannot give it a license to repudiate the fiduciary responsibilities it has undertaken in connection with joint-defense efforts in this or any other litigation or proceedings. *See American Standard, Inc.* v. *Bendix Corp.*, 71 F.R.D. 443, 447 (W.D. Mo. 1976) (duty imposed upon nonparties to litigation not to disclose work-product material given to them because of their agreement to keep such material confidential).

[14] Plaintiffs' attempts to support their position wholly miss the point. The cases they point to as ones involving a rule limited to nondisclosure *by attorneys* (Plaintiffs' Memorandum at 10-11) did not address any distinction, as plaintiffs seek to create, between voluntary as opposed to compelled disclosure. Moreover, in at least one of those cases (*Hunydee* v. *United States*, 355 F.2d 183 (9th Cir. 1965), testimony was sought from both a codefendant and her attorney relating to confidential communications in the course of joint-defense efforts. The court held that neither could testify; the rule was no different for the party than it was for the attorney. *Id.* at 184-85. Moreover, the facts in *Hunydee* indicate that the proposed disclosure in question was voluntary, resulting from an agreement by a codefendant and her counsel to cooperate with the Government in prosecution of her codefendant husband in exchange for her own exoneration. 355 F.2d at 184.

Plaintiffs' reliance upon the purportedly "analogous" area of the law regarding informants and turncoat witnesses in

Non-settling defendants do not read into I.P.'s actions in connection with its settlement with the class action plaintiffs the kind of turncoat conduct envisaged by plaintiffs in their memorandum. Rather, I.P. appears to have recognized its obligations as a participant in joint-defense efforts. But non-settling defendants believe that, notwithstanding any such recognition, the procedures for production of documents and other information set forth in paragraph 15 are wholly inadequate to protect their rights. Moreover, the mere suggestion by plaintiffs of a vast and unprecedented exception to the joint-defense doctrine that would allow "voluntary" disclosure of shared confidences by parties to such efforts cannot go unanswered for fear that silence would be construed as acquiescence in so unfounded a rule.

In this regard, it is worth noting one court's reaction to a similar attempt to construe the joint-defense rule narrowly, as plaintiffs seek to do:

> [T]o allow such disclosure would so further erode the privilege's protection as to reduce joint defense to an improbable alternative. How well could a joint defense proceed in the light of each co-defendant's knowledge that any one of the others might trade resultant disclosures to third parties as the price of his own exoneration . . . . The attorney-client privilege . . . should not thus be whittled away.

In re Grand Jury Subpoena Duces Tecum Dated November 16, 1974, 406 F. Supp. 381, 394 (S.D.N.Y. 1975). No rule could present such danger to the continued viability

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criminal cases is equally deceptive. Plaintiffs' Memorandum at 12-13. Stated quite simply, those cases deal with rules of criminal procedure in connection with fourth amendment protections against unreasonable search and seizure, and they do not involve, nor are they relevant to, any consideration of privilege in connection with joint-defense efforts.

of joint-defense efforts as clearly as the one now posited by plaintiffs.[15]

Plaintiffs' contentions with respect to the work-product immunity in the joint defense context are wholly incongruous. After conceding that the work-product immunity is a right held by the attorney, "which can be waived by, and only by, the attorney", and that an attorney may share his work product with counsel for codefendants in the joint-defense context without waiving his or their right to assert the immunity, plaintiffs somehow would create a right to disclose such work product "voluntarily . . . either by public utilization or by private disclosure to others." Plaintiffs' Memorandum at 15. It is simply inexplicable, however, that such disclosure could be made when it is subject to an immunity from disclosure that has not been waived by the very parties who, as plaintiffs concede, possess the sole right to effect such a waiver. It is equally absurd to state that the work product generated or received by I.P.'s counsel as part of joint-defense efforts may be disclosed if I.P. so chooses because such materials possibly would have been created or learned by I.P.'s counsel in connection with I.P.'s defense even if no joint-defense efforts had been undertaken. *See* Plaintiffs' Memorandum at 15-16. Such pure speculation cannot offset the obvious fact that work

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[15] While plaintiffs here contend that a "meaningful" cooperative defense could be carried out under the restrictions they would impose, it should be noted that they have not hesitated to promote the use of joint-defense efforts when it happens to suit their convenience. For example, in Plaintiffs' Joint Memorandum Re Proposed Discovery Program and Schedule, recently filed with the Court, plaintiffs stressed the need for channelling all of the discovery in these cases through centralized committees; there the plaintiffs suggested assignment to committees or lead counsel of "substantive pretrial duties," even though each party may have its own independent interest and its own counsel. *Id.* at 4.

product generated as part of a joint-defense effort is the work product of all counsel participating in that effort, which, in these cases, has been mandated by this Court.[16]

The fundamental unfairness of the procedure contained in paragraph 15 of the I.P. Settlement Agreement

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[16] Plaintiffs subtly suggest an additional purported basis upon which they should be entitled to material in I.P.'s possession that is subject to a privilege belonging to another party over the objection of that party, by alluding to the rule that the attorney-client privilege is not a bar to disclosure in controversies *inter sese* between parties who formerly shared a confidential and hence privileged relationship. Plaintiffs' Memorandum at 5 n.*, 10 n*. Again, however, plaintiffs have seriously mischaracterized the precedent they cite, by implying that it supports a "right" of I.P. to produce (presumably to anyone, including plaintiffs) "all communications" to its attorneys or to any attorney regarding the merits of this litigation in the event that non-settling defendants object to court approval of the I.P. settlement and hence create a "controversy" between themselves and I.P.

In re Grand Jury Subpoena Duces Tecum Dated November 16, 1974, 406 F. Supp. 381 (S.D.N.Y. 1975), the only case cited by plaintiffs to support this contention, clearly requires a different result. The court there noted the restrictive application that has been, and properly must be, given to this exception to the rule of nondisclosure:

> To be sure, confidence shared by joint defendants and their counsel are effectively shielded against outside access. On the law established to date, that shield may be lowered only when the parties once joined assume the stance of opposing parties in subsequent litigation.

Id. at 394. To find the requisite "controversy" in an effort by one defendant to prevent disclosure of privileged materials by a coparticipant in joint-defense efforts would create the anomalous result of having an attempt to prevent disclosure actually divest the materials of the privilege that provides the basis for preventing disclosure.

emanates from the fact that the class action plaintiffs, by an agreement to which they and a settling defendant alone are parties, seek to reverse completely the discovery procedures usually applicable to protection of privileged material. Thus, in the usual discovery procedure, the plaintiffs, who are seeking discovery of privileged material, would have to seek court approval to obtain it. Fed. R. Civ. P. 34(b) (if objection is made to requested production, party seeking discovery may move for an order to compel discovery under rule 37(a)). Under paragraph 15(c), however, the holder of the privilege would be forced to seek a court order to prevent production.[17] There is absolutely no reason why, by settlement agreement or otherwise, the plaintiffs should be allowed to bring about such a disruption of the discovery process and thereby place the rights of others in jeopardy.[18]

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[17] Plaintiffs suggest in their memorandum that the solution to all of non-settling defendants' objections is for them to prepare a list of all "purportedly privileged" materials, supposedly pursuant to "their duty to identify the relevant communication." Plaintiffs' Memorandum at 4. Plaintiffs, however, cite no authority for this supposed "duty to identify" and, it is clear, none is available; on the contrary, it is established that there is no such duty, even in the usual discovery context, when such identification would itself disclose the privileged content. *See, e.g., Duplan Corporation* v. *Deering Milliken, Inc.*, 397 F. Supp. 1146, 1156-58 (D.S.C. 1975); *United States* v. *Anderson*, 34 F.R.D. 518, 523-25 (D. Colo. 1963). It is even more questionable, therefore, to suggest that such a duty should be imposed upon non-settling defendants because they seek to forestall production of documents by another to protect their privileges, the continued preservation of which might be threatened by such production.

[18] Moreover, the kind of specific disclosure seemingly required of a paragraph 15(c) notice not only is not practicable within the short time frame provided, but also is

IV. *Conclusion*

The basic fallacy underlying plaintiffs' asserted reasons for denying non-settling defendants' motion for a protective order is their failure to recognize that the privileges and immunities in question belong to parties other than I.P. or any other settling defendant and that the documents and other information to which these privileges apply have come into the possession of settling defendants and their counsel because of their participation in joint-defense efforts. As discussed above, such joint-defense efforts depend largely upon the assurance that all participants will maintain the confidences reposed in them by codefendants and their counsel. The procedures plaintiffs would follow, as suggested by the language of paragraph 15(c) of the I.P. Settlement Agreement and as evolved in connection with their September 29 request to I.P., also overlook this fact. Whatever purpose may be intended to be served by paragraph 15 of the I.P. Settlement Agreement or any similar provision, there is absolutely no basis for allowing plaintiffs, by virtue of an agreement with a settling defendant, to impair the abilities of others to assert their privileges.

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improper because it is to be directed both to the holders of the applicable privilege and *to plaintiffs*. It is clear that there are instances in which a mere description of privileged material may be sufficient effectively to disclose the privileged content; in such cases, there is no duty to make a specific disclosure to an adverse litigant. *See* note 17 *supra*. Yet the notice procedure contemplated by paragraph 15(c) necessarily places I.P. and its counsel in the position of having to choose between specific identification that could effectively breach a confidence reposed in them or failing to particularize, thereby requiring the holders of the privilege to seek its protection amidst the uncertainty of not knowing precisely which documents I.P. believes are responsive to a particular request to produce.

Thus, for all of the foregoing reasons, this Court should enter a protective order in the form of the proposed order attached hereto as Appendix A.

Respectfully submitted,

/s/ *Cloyd R. Mellott*
CLOYD R. MELLOTT
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42nd Floor, 600 Grant Street
Pittsburgh, Pennsylvania 15219
(412) 566-6000

On behalf of the defendants listed on the following page.

Dated: December 11, 1978

The foregoing is filed on behalf of the following defendants:

Alton Box Board Company
Boise Cascade Corporation
The Chesapeake Corporation of Virginia
Consolidated Packaging Corporation
Container Corporation of America
Crown Zellerbach Corporation
Diamond International Corporation
Dura-Containers, Inc.
Fibreboard Corporation
Georgia-Pacific Corporation
Green Bay Packaging, Inc.
Inland Container Corporation
Interstate Container Corporation
Longview Fibre Company
MacMillan Bloedel, Inc.
The Mead Corporation
Olinkraft, Inc.
Owens-Illinois, Inc.
Packaging Corporation of America
Potlatch Corporation
St. Joe Paper Company
Southwest Forest Industries, Inc.
Stone Container Corporation
U.S. Corrugated—Fibre Box Company
Western Kraft East, Inc.
Westvaco Corporation
Weyerhaeuser Company
Willamette Industries, Inc.

IN THE DISTRICT COURT OF
THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE:

CORRUGATED CONTAINER
ANTITRUST LITIGATION

PRETRIAL HEARING

December 14, 1978

* * * *

[18] THE COURT: I believe I am correct. However, I stand to be corrected. There is such a volume of papers filed in these cases that I cannot always keep in my head what has been filed and what hasn't, but I don't believe that I have read any opposition by any of the defendants to a preliminary approval of these settlement agreements.

If anybody wants to speak to that, I'd be glad to listen to them.

MR. JEFFERS: Your Honor, what I have to submit I think would be appropriately submitted at this time.

For the record, I am Leroy Jeffers, counsel for the defendant, Inland Container Corporation.

What I have to say is not addressed to the total approval or disapproval of the proposed settlement agreements but rather to the submission to the Court of two conditions which [19] Inland Container Corporation and a substantial number of the other defendants, at least—

THE COURT: The non-settling defendants, you mean?

MR. JEFFERS: Non-settling defendants—believe should, in the exercise of the Court's discretion, be attached as conditions to preliminary approval.

The first one that I would like to submit to Your Honor is the proposal that preliminary approval of the settlement agreements should be conditioned upon the removal from the area of damages applicable to the non-settling defendants, the amounts of the sales, the market shares of the settling defendants. It is an issue that those who have researched it tell me is now pending before courts of appeals in at least three different cases. It has not yet been definitively decided, but it seems to me that addressing this to the discretion of the Court and the equities involved, that such a [20] condition should be attached on general principles. It is well established that an antitrust treble damage plaintiff cannot have double recovery for the same injuries. He gets treble damages on the injury which does occur, but he cannot recover more than once for the same injury.

Your Honor had such a matter before you in the case of *Woods Exploration and Producing Company* vs. *Aluminum Company of America* in which Your Honor held—and while the Fifth Circuit improvidently reversed the judgment for the defendants in that case, they did sustain Your Honor upon the ruling by which you enjoined the plaintiffs from proceeding in a state court action against the same defendants based upon the same facts and the same injury, the law being well settled that the plaintiff simply cannot recover twice for the same injury.

If the sales of the settling defendants are left in the damage area, exactly that would occur.

[21] The matter was again before the courts in the case of *Martin* vs. *Phillips Petroleum Company*, tried before Judge Connolly during his lifetime, in which case I was also counsel. And in that case, after a federal court trial, the state court of appeals sustained a state trial court in holding that there could not be a second recovery

in the same court predicated upon the same facts and the same injury; that while the federal court recovery, when there is recovery, is trebled, that you cannot, in the first instance, find anything more than single damages before trebling and there cannot be recovery upon the basis of the same injury twice.

And if you leave the sales of the settling defendants in the case as this settlement agreement undertakes to do as to the non-settling defendants, then the same injury, the same damages predicated upon those sales, according to the plaintiff's statement in support of approval of the settlement and according to the [22] provision of the settlement agreement as I interpret them, the same injury, the same damages, resulting from the same sales, could be repeatedly recovered upon time after time, in essence, so that if you ended up with a single defendant that went to trial in this case and all of the others had settled and thereby compensated for any injuries based upon their sales, still under the plaintiffs' theory recovery could be had against the sole remaining defendant for damages predicated upon the sales of all of the other defendants for which settlements had already been made.

So we submit to Your Honor that basic principles against double recovery and fairness and equity dictate that a condition should be attached to the preliminary approval of these settlement agreements to the effect that the sales of the settling defendants must be removed from the market upon which damages is claimed as to the non-settling defendants.

[23] The second proposition we wish to address to the discretion of the Court and the Court's equitable consideration and preliminary approval of these settlement agreements is that these settlement agreements have been entered into and are presented to the Court as being fair and reasonable settlement agreements. If they are fair and reasonable settlement agreements as to the Defend-

ants International Paper Company and St. Regis Paper Company, they are fair and reasonable settlement agreements as to all of the other defendants because the margin of time is not such as to alter that.

We have not yet plunged into this massive discovery program which lies ahead of us. At least 12 of the major market share defendants in this case stand ready at this time—and I will state upon the record—to enter into settlement negotiations with the plaintiffs on the basis of the International Paper Company settlement formula. And I [24] think I can say with reasonable certainty that a bulk of the litigation could be disposed of on that basis and a major market share removed from the litigation.

It is also my belief that upon the basis of the St. Regis Paper Company's settlement formula, that the bulk of the remaining defendants would be eager and ready to go forward with settlement negotiations so that judicial economy would be achieved, the best interest of the class for whom the plaintiffs have been certified to sue would be achieved by an early disposition of this litigation, in all likelihood, without the tremendous expense occurring of costs and attorneys' fees involved in this massive discovery schedule and in a trial of gargantuan length.

I do not purport, in making these statements to the Court, to speak for each and every defendant, but I do certainly speak for a substantial number of defendants.

So our proposal to the Court is [25] that there should further be attached to preliminary approval of the settlement agreements the condition that the same terms of settlement be made available to non-settling defendants similarly situated to the extent that such defendants may desire to take advantage of it. We think that while that may be innovative, it may not be something that there is a lot of case law or precedent on.

We do think that it would represent the splendid progressive management, judicial management, of this mam-

moth litigation and we urge those two considerations upon the Court.

Thank you, Your Honor.

THE COURT: As to your first proposition, Mr. Jeffers, that is the removal of the sales of the settling defendants from the consideration of damages, it occurs to the Court that that matter is premature at this time. It would seem to me that after a final settlement, if and when final settlement conference or approval by the Court of [26] any settlements and a notification to the class of those settlements occurs, then after that time and before any trial of the case, that that is an issue that should be discussed relative to the presentation of evidence at an actual trial.

As to your second proposition, the fair and reasonable, I will just comment on one remark you made about fair and reasonable as to the settling defendants. That, of course, while it is of some consideration to the Court, it is a relatively minor consideration because the fair and reasonable test is fair and reasonable to the class as a whole, not to the settling defendants.

MR. JEFFERS: I probably misspoke myself, Your Honor. I certainly intended to convey the argument and the thought that if it is fair and reasonable as to the class of plaintiffs in the instance of St. Regis and International Paper, that it would likewise be fair and reasonable to such class of plaintiffs in [27] the instance of these other defendants.

THE COURT: And as to your second proposition as a whole, of course, as you know, that matter has been informally discussed with the Court and the Court's position on that is, I believe, pretty clear at this point, and that is that whatever settlements the parties in this case wish to enter into, that is all well and good with the Court, but the Court is not at this time in any position to assert any active role in that matter for the reasons that I have already indicated.

Now, on this settlement—let me say this. I don't have the date in mind exact, but it seems to me that the class in this case was certified sometime in September or October. But, in any event, it has been some period of time.

Under the rules, the Federal—well, Rule 23 and the cases with which this Court is familiar, under that rule it is time that we address the issue of notification to the purported class and the form of notice to be prepared.

IN THE DISTRICT COURT OF
THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. No. 310

IN RE: CORRUGATED CONTAINER
ANTITRUST LITIGATION

This Document Relates To:

ALL ACTIONS EXCEPT

DEAN FOOD COMPANY, ET AL.
(C.A. No. H-78-2004)
DRAPER-KING COLE, INC., ET AL.
(C.A. No. H-78-1226)
FRANKLIN CONTAINER CORP., ET AL.
(C.A. No. H-78-671)
IOWA BEEF PROCESSORS, INC., ET AL.
(C.A. No. H-78-1263)
ITT CONTINENTAL BAKING CO.
(C.A. No. H-78-376)
SUNMARK, INC.
(C.A. No. H-78-1815)
UNITED FARMERS COOPERATIVE, INC., ET AL.
(C.A. No. H-77-2158)
UNITED FOODS, INC., ET AL.
(C.A. No. H-78-4)

AGREEMENT OF SETTLEMENT WITH DEFENDANT BOISE CASCADE CORPORATION

Filed December 28, 1978

WHEREAS, certain plaintiffs are prosecuting MDL No. 310 now pending before the above-entitled Court (hereinafter "the Court") as a class action;

WHEREAS, the Court ruled in its Order filed on September 6, 1978, that these actions may proceed as a class action on behalf of the class as defined in said Order;

WHEREAS, plaintiffs alleged that defendant Boise Cascade Corporation (hereinafter the term "Settling Defendant" refers to Boise Cascade Corporation and includes the entity known as Boise Cascade Corporation and all of its predecessors, and for Boise Cascade Corporation and each such predecessor, all past and present subsidiaries, affiliates, unincorporated entities and divisions) was a participant in an unlawful conspiracy to fix, raise, maintain or stabilize the prices of corrugated containers and sheets and it has denied material allegations of plaintiffs' complaints and raised certain affirmative defenses thereto;

WHEREAS, Settling Defendant, denying wrongdoing of any kind whatsoever, has nevertheless agreed to enter into this Agreement of Settlement to avoid further expense, inconvenience and the distraction of burdensome and protracted litigation;

WHEREAS, plaintiffs have conducted investigations into the facts of these cases, reviewed at length and analyzed the grand jury documents produced by the defendants, and the government trial exhibits made available to plaintiffs, and have conducted other formal and informal investigations and have concluded that a settlement with Settling Defendant in the amount hereinafter set forth is in the best interests of plaintiffs and the class;

NOW, THEREFORE, it is agreed by and among the undersigned that these class actions be settled and compromised with Settling Defendant, upon approval by the Court, after a hearing as provided for herein, without affecting any joint and several liability of any non-settl-

ing defendant for any of the acts complained of by plaintiffs in any of their complaints, including, but not limited to, acts of Settling Defendant, on the following terms and conditions:

1. The undersigned counsel represent that they are fully authorized to enter into the terms and conditions of, and execute, this Agreement.

2. The undersigned agree to undertake their best efforts, including all steps and efforts contemplated by this Agreement, and any other steps and efforts which may become necessary by order of the Court or otherwise, to effectuate this Agreement and the settlement set forth herein.

3. For the purposes of this Agreement only, the undersigned agree that there shall be designated the following Settlement Class in MDL No. 310:

> All persons in the United States (excluding defendants and ~~all~~ subsidiaries and affiliates of defendants and all independent corrugated box manufacturers as defined in the Unified and Consolidated Complaint on file herein) who purchased corrugated containers or corrugated sheets from any defendant, or any subsidiary or affiliate of any defendant, at any time during the period from January 1, 1960 to January 25, 1978.

4. Said Settlement Class shall be represented by the class representatives designated by the Court in its Order dated October 26, 1978, or as may be otherwise designated by the Court.

5. In full and complete settlement of these class actions against Settling Defendant and subject to the remaining provisions hereof, Settling Defendant shall deposit Nine Million Eight Hundred Ninety-One Thousand and No./100 Dollars ($9,891,000.00), in cash, in escrow,

as described hereinafter, on or before the execution of this Agreement. Said amount and the interest thereon shall be referred to hereinafter as the "Fund". Except as otherwise expressly provided herein, Settling Defendant shall not be liable for any costs (including the costs of notice to class members) or attorneys fees, but all such costs and attorneys' fees as approved by the Court shall be paid out of the Fund and interest earned thereon. In the event Settling Defendant requests notice of this Settlement to be sent to members of the class prior to general notice of certification to class members, Settling Defendant will pay the costs of such notice. In the event federal income tax liability is finally assessed against and paid by Settling Defendant as a result of income earned in the Fund, Settling Defendant shall be entitled to reimbursement of such payment from the Fund. Settling Defendant will use its best efforts to resist any such assessment or payment.

6. Settling Defendant agrees, at its costs, to identify all class members in MDL No. 310 who purchased corrugated containers and sheets (as described in paragraph 3 hereof) from Settling Defendant to the extent that such information is available to Settling Defendant.

7. The Fund shall be invested in certificates of deposit in a bank by Stephen D. Susman and Vance K. Opperman, or their designees, as escrow agents and attorneys for the class. John T. Loughlin shall act as escrow agent for the Fund on behalf of Settling Defendant until entry of the Court's final order or judgment as provided in paragraph 10 of this Agreement. Any interest earned on the Fund shall become and remain a part thereof. The Settling Defendant shall be advised with respect to the bank or banks issuing such certificates of deposit and the amount thereof and receive reports, on request, on the status of the Fund. In lieu of the foregoing provisions of paragraph 7 of this Agreement, the parties may

agree to nominate a bank as escrow agent for the fund, which bank shall hold and disburse such funds pursuant to an escrow agency agreement in a form agreeable to the parties.

8. The escrow agents and plaintiffs will be reimbursed and indemnified out of the Fund for all costs and expenses incurred in the administration and distribution of the Fund. Disbursements for such costs and expenses shall be made from time to time only upon the approval of the Court. Settling Defendant shall have no responsibility with respect to the allocation, administration, or distribution of the Fund except as expressly provided herein.

9. No distribution of the Fund shall be made until (i) the Court has approved this Agreement and the settlement set forth herein pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, (ii) the entry of the Court's final order or judgment approving this Agreement and the settlement set forth herein and dismissing with prejudice the claims of the plaintiffs and the Settlement Class members against Settling Defendant, (iii) the final affirmance on appeal of, or the final dismissal of an appeal from or the expiration (without the filing or noticing of an appeal) of the time to appeal from said final order or judgment, and (iv) an order of the Court allowing such distribution. Subject to the foregoing, (a) distributions from the Fund approved by the Court may be made to pay approved costs and expenses, past and future, incurred by the plaintiffs or plaintiffs' counsel in these MDL proceedings, (b) such distributions may be made from time to time on an interim basis prior to time when the remaining balance of the Fund may be distributed to Settlement Class members, and (c) all such interim distributions shall be paid from the Fund only if authorized or approved by and upon the application of the Plaintiffs' Steering Committee and upon approval of the Court.

10. Upon the Court's approval of this Agreement and the settlement set forth herein, pursuant to said Rule 23(e), said final order or judgment shall be entered which shall provide that all claims of the plaintiffs and the members of the Settlement Class, as against Settling Defendant only, arising under the antitrust laws of the United States or of any state or other jurisdiction, or any similar statutory or common law, which have been, might have been, are now or could be asserted in these actions in connection with corrugated containers and corrugated sheets or which relate to or arise out of the unlawful conspiracy to fix, raise, maintain or stabilize the prices of corrugated containers or corrugated sheets alleged in the Unified and Consolidated Complaint on file herein shall be dismissed with prejudice; provided, however, that said final order or judgment shall not be entered unless and until the time with which the Settling Defendant may withdraw from or terminate this Agreement and the settlement set forth herein pursuant to the provisions of paragraph 13 has expired (without such withdrawal or termination having taken place).

11. The settlement set forth in this Agreement shall not become effective unless and until this Agreement is approved in MDL No. 310 in all respects by the Court, (including the approval of the Settlement Class, as defined in paragraph 3 hereof), and, in the event that the Court refuses to approve this Agreement or any material part of it, this entire Agreement shall become null and void unless all parties promptly agree to proceed with the settlement as and if modified by the Court. In the event this Agreement becomes null and void for any reason, including, but not limited to, withdrawal by Settling Defendant, the Fund shall be disbursed to Settling Defendant, except that any costs of administering the Fund or the settlement set forth in this Agreement, exclusive of attorneys' fees, shall first be deducted before the Fund is returned to Settling Defendant. It is ex-

pressly understood and agreed that this Settlement Agreement shall remain in full force and effect notwithstanding any revocation or modification by any court of the Court's September 6, 1978 Class Certification Order.

12. The fact of this settlement with the Settling Defendant shall not be construed to affect, in any manner whatsoever, any joint or several liability of any of the nonsettling defendants for the conspiracy and other acts alleged in the complaints, including but not limited to, any acts of Settling Defendant, any putative common law rule or practice, or state or local statute, to the contrary notwithstanding. Claimants upon the Fund prior to participation therein will execute and deliver covenants not to sue Settling Defendant, or any of its officers, directors or employees, under the antitrust laws of the United States or of any State or other jurisdiction, or any similar statutory or common law, asserting claims which relate to or arise out of the unlawful conspiracy to fix, raise, maintain or stabilize the prices or corrugated containers or sheets alleged in the Unified and Consolidated complaint on file herein, on the checks or claim forms.

13. The parties have agreed that the Settling Defendant may terminate this Agreement if requests for exclusion from the class are made by potential class members in an amount, and in accordance with the terms and conditions set forth in a separate agreement filed with the Court under seal.

14. Effective upon the execution of this Agreement by the undersigned counsel, Settling Defendant agrees to cooperate fully with the designees of Plaintiffs' Steering Committee in connection with each of the following matters:

(a) Settling Defendant agrees that, notwithstanding the entry of said final order or judgment, pur-

suant to paragraph 10 hereof, Settling Defendant shall continue to be considered a party defendant in these class actions for the sole purpose of discovery to be conducted pursuant to the Federal Rules of Civil Procedure;

(b) Settling Defendant agrees to retain, pending the final disposition of all cases involved in these MDL proceedings, all documents or other evidence, if any, in its possession, custody or control, or in the possession, custody or control of its attorneys or other agents relating to the subject matter of these MDL proceedings, including but not limited to, copies of transcripts of the proceedings before the United States Grand Jury for the Southern District of Texas in its investigation of the corrugated container industry, interviews by Government attorneys taken in connection with said investigation, interviews of witnesses taken by or on behalf of Settling Defendant, and summaries thereof.

(c) Settling Defendant agrees to promptly deliver or otherwise make readily available to Plaintiffs' Steering Committee, subject to an agreed protective order and the provisions of paragraph 14(d), all documents and other evidence relevant to the claims in the Unified and Consolidated Complaint in Settling Defendant's possession, custody or control pursuant to requests made by Plaintiffs' Steering Committee.

(d) Nothing in this Agreement shall require Settling Defendant to provide any information or documents subject to an attorney work product, attorney client, Fifth Amendment or group defense privilege, or a court order of non-disclosure, nor shall such privileges be deemed waived.

(e) Settling Defendant shall, consistent with Settling Defendant's obligations, identify with particularity the information or documents which are subject to the provisions of paragraph 14(d) and the factual basis for the asserted privilege, to the extent that such identification does not constitute a breach of the asserted privilege.

(f) Nothing in this Agreement is intended or shall be construed to prevent plaintiffs from discovering any documents, evidence or information that would be otherwise discoverable under the Federal Rules of Civil Procedure.

15. Plaintiffs agree that, unless present circumstances materially change so that plaintiffs reasonably conclude that the prospect or amount of ultimate recovery from any similarly situated defendant is substantially lessened or reduced, they will not enter into a settlement of the class actions in MDL 310 with any such similarly situated defendant that is more favorable to such defendant insofar as it relates to paragraphs 5 and 13 of this Agreement, or any protective provisions based on federal legislation which effectively overruled *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), without offering similar terms to Settling Defendant hereunder; *provided*, however, that, with respect to paragraph 13 and said protective provisions, said Settling Defendant agrees to pay such additional amount as necessary to make the aggegate amount paid by settling Defendant proportionately equal to the aggregate amount paid by such other defendant.

16. This Agreement shall become effective upon its execution by the undersigned counsel as of the 27th day of December, 1978.

MANDELL & WRIGHT
Stephen D. Susman, Chairman
Plaintiffs' Steering Committee
806 Main Street, 21st Floor
Houston, Texas 77002

VANCE K. OPPERMAN,
Vice Chairman,
Plaintiffs' Steering Committee
1500 First National Bank Building
St. Paul, Minnesota 55101

By: /s/ *Stephen D. Susman*
STEPHEN D. SUSMAN
On Behalf of Plaintiffs' Steering Committee (except James Sloan and Granvil Specks,* Designated Class Representatives (except Ilikon Corp.)** and All Reserve Class Action Plaintiffs (except Denver Meat Co., Townhouse Furniture, Penthouse Furniture, Ltd., Douglas Furniture Corp., André-Boudin Bakeries, Inc., and Salsbury Meats, Inc.,)

BOISE CASCADE CORPORATION

By: /s/ *John T. Loughlin*
JOHN T. LOUGHLIN

/s/ *R. Clifford Potter*
R. CLIFFORD POTTER
Bell, Boyd, Lloyd, Haddad & Burns
135 South LaSalle
Chicago, Illinois 60603

*And Jack Chestnut

** And Sambo's Restaurants, Inc.
Northland Aluminum Products

[Certificate of Service omitted]

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. No. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

This document relates to:

ALL ACTIONS EXCEPT THOSE
IDENTIFIED ON EXHIBIT II
ANNEXED TO THE UNIFIED AND
CONSOLIDATED COMPLAINT AND

DRAPER-KING COLE, INC., ET AL.
(C.A. No. H-78-1226)
FRANKLIN CONTAINER CORP., ET AL.
(C.A. No. H-78-671)
IOWA BEEF PROCESSORS, INC.
(C.A. No. H-78-1263)

MOTION FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL ANSWER AND CROSS-CLAIM

Filed March 1, 1979

Defendant Westvaco Corporation ("Westvaco") hereby moves this Court for leave to amend its answer pursuant to Rules 13(g) and 15(a), Fed. R. Civ. P., to assert a cross-claim for contribution against defendants Boise Cascade Corporation, Champion International Corporation, The Chesapeake Corporation of Virginia, Container Corporation of America, The Continental Group, Inc., Corco, Inc., Diamond International Corporation, Dura-Containers, Inc., Green Bay Packaging, Inc., Hoerner Waldorf

Corporation, Inland Container Corporation, International Paper Company, Longview Fibre Company, MacMillan Bloedel, Inc., MacMillan Bloedel Containers, Inc., Menasha Corporation, Olinkraft, Inc., Owens-Illinois, Inc., St. Joe Paper Company, St. Regis Paper Company, Stone Container Corporation, Union Camp Corporation, U.S. Corrugated-Fibre Box Company, Western Kraft East, Inc., Weyerhaeuser Company, Willamette Industries, Inc., John Doe, Inc., and Richard Roe, Inc., (hereinafter referred to collectively as the "Settling Defendants") in the form attached as an appendix hereto, on the ground that justice so requires in order that all issues between the parties may be fully and efficiently litigated in this action. This Motion supplements and incorporates a similar Motion filed by Westvaco Corporation on December 7, 1978, seeking to amend its answer to assert a cross-claim against defendants St. Regis Paper Co. and International Paper Co.

This motion does not violate any limitation on time for filing imposed by the Local Court Rules of this Court or any special order of this Court in this litigation but the time for amending the Westvaco Answer as of right has expired.

In compliance with Local Rule 16 H(2), counsel for Westvaco have conferred in person by telephone with counsel for each of the Settling Defendants and counsel for plaintiffs (chairman of Plaintiffs' Steering Committee), and have been informed by said counsel that they intend to oppose this Motion. A schedule of those telephone conversations is annexed hereto as Schedule A.

Dated: February 27, 1979

SKADDEN, ARPS, SLATE,
MEAGHER & FLOM

By /s/ *Leslie H. Arps*
LESLIE H. ARPS
919 Third Avenue
New York, New York
10022
Attorneys for
Defendant
Westvaco Corporation

Of Counsel:

Thomas R. Long
Ralph R. Ferney
Westvaco Corporation
299 Park Avenue
New York, New York 10017

SCHEDULE A

Counsel for Westvaco	Opposing Counsel	Parties	Time
Leslie H. Arps	H. Richard Wachtel Grant S. Lewis LeBoeuf, Lamb, Leiby & MacRae	St. Regis Paper Co.	afternoon of Dec. 6 & 7, 1978
Leslie H. Arps	Henry L. King Davis, Polk & Wardwell	International Paper Co.	afternoon of Dec. 6 & 7, 1978
Leslie H. Arps	Stephen D. Susman Mandell & Wright	Chairman, Plaintiffs Steering Committee	morning of Dec. 6, 1978, afternoon of Dec. 7, 1978
Nancy M. Higgins	John J. McHugh Chadwell, Kayser, Ruggles, McGee & Hastings, Ltd.	Container Corp. of America	morning of Feb. 22, 1979
Nancy M. Higgins	Leroy Jeffers Vinson & Elkins	Inland Container Corp.	morning of Feb. 22, 1979
Nancy M. Higgins	Richard N. Carrell Fulbright & Jaworski	St. Joe Paper Co.	morning of Feb. 22, 1979
Nancy M. Higgins	Robert J. Malinak Baker & Botts	Stone Container Corp.	morning of Feb. 22, 1979
Nancy M. Higgins	Thomas G. Slater Hunton & Williams	Chesapeake Corp. of Virginia	morning of Feb. 22, 1979
Nancy M. Higgins	David Bland Barrow, Bland & Rehmet	U.S. Corrugated-Fibre Box Co.	morning of Feb. 22, 1979
Nancy M. Higgins	Thomas P. Hanrahan Kirkland & Ellis; J. Curie Bechtol Foreman, Dyess, Prewett, Rosenberg & Henderson	Willamette Industries, Inc./Western Kraft East, Inc./Corco, Inc.	morning of Feb. 22, 1979
Nancy M. Higgins	Ira Postel Shea, Gould, Climenko, Kramer & Casey	Diamond International, Inc.	afternoon of Feb. 22, 1979
Nancy M. Higgins	Earl E. Pollock Gary Senner Sonnenschein Carlin Nath & Rosenthal	Owens-Illinois, Inc.	afternoon of Feb. 22, 1979; afternoon of Feb. 23, 1979
Nancy M. Higgins	C. Kenneth Shank, Jr. Webster & Sheffield	Olinkraft, Inc.	morning of Feb. 23, 1979
Nancy M. Higgins	Alice Parker Schiff Hardin & Waite	The Continental Group	morning of Feb. 23, 1979
Nancy M. Higgins	Ronald W. Davis White & Case	MacMillan Bloedel, Inc./ MacMillan Bloedel Containers, Inc.	afternoon of Feb. 23, 1979
Nancy M. Higgins	Robert J. Bagdasarian Breed, Abbott & Morgan	Union Camp Corp.	afternoon of Feb. 23, 1979
Shepard Goldfein	John H. Morrison Kirkland & Ellis	Weyerhaeuser Company	afternoon of Feb. 23, 1979

Counsel for Westvaco	Opposing Counsel	Parties	
Shepard Goldfein	William A. Stearns Quarles & Brady	Menasha Corp.	afternoon of Feb. 23, 1979
Nancy M. Higgins	John T. Loughlin Bell, Boyd, Lloyd, Haddad & Burns	Boise Cascade Corp.	morning of Feb. 26, 1979
Nancy M. Higgins	Wayne J. Roper Gibbs, Roper, Loots & Williams	Green Bay Packaging	morning of Feb. 26, 1979
Nancy M. Higgins	Richard M. Clinton Bogle & Gates	Longview Fibre Co.	afternoon of Feb. 26, 1979
Kenneth A. Plevan Nancy M. Higgins	Robert B. Abendroth James W. Greer, Jr. Whyte & Hirschboeck	Champion International, Inc./ Hoerner Waldorf Corp.	afternoon of Feb. 21, 1979, afternoon of Feb. 26, 1979

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. No. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

This document relates to:

ALL ACTIONS EXCEPT THOSE
IDENTIFIED ON EXHIBIT II
ANNEXED TO THE UNIFIED AND
CONSOLIDATED COMPLAINT AND

DRAPER-KING COLE, INC., ET AL.
(C.A. No. H-78-1226)
FRANKLIN CONTAINER CORP., ET AL.
(C.A. No. H-78-671)
IOWA BEEF PROCESSORS, INC.
(C.A. No. H-78-1263)

ORDER

Defendant Westvaco Corporation having moved this Court on February 27, 1979 pursuant to Rules 13(g) and 15(a) of the Federal Rules of Civil Procedure for leave to amend its answer and assert a cross-claim for contribution against Defendants Boise Cascade Corporation, Champion International Corporation, The Chesapeake Corporation of Virginia, Container Corporation of America, The Continental Group, Inc., Corco, Inc., Diamond International Corporation, Dura-Containers, Inc., Green Bay Packaging, Inc., Hoerner Waldorf Corporation, Inland Container Corporation, International Paper Company, Longview Fibre Company, MacMillan Bloedel,

MacMillan Bloedel Containers, Inc., Menasha Corporation, Olinkraft, Inc., Owens-Illinois, Inc., St. Joe Paper Company, St. Regis Paper Company, Stone Container Corporation, Union Camp Corporation, U.S. Corrugated-Fibre Box Company, Western Kraft East, Inc., Weyerhaeuser Company, Willamette Industries, Inc., John Doe, Inc. and Richard Roe, Inc., in the form annexed to its motion and the Court being of the opinion that justice so requires,

IT IS HEREBY ORDERED that Defendant Westvaco Corporation may amend its answer and assert a cross-claim for contribution against said Defendants in the form attached to its motion.

DONE at Houston, Texas, this day of , 1979.

United States District Judge

[Certificate of Service omitted]

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. No. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

This document relates to:

ALL ACTIONS EXCEPT THOSE
IDENTIFIED ON EXHIBIT II
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CONSOLIDATED COMPLAINT AND

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FRANKLIN CONTAINER CORP., ET AL.
(C.A. No. H-78-671)
IOWA BEEF PROCESSORS, INC.
(C.A. No. H-78-1263)

AMENDED AND SUPPLEMENTAL ANSWER OF DEFENDANT WESTVACO CORPORATION TO THE UNIFIED AND CONSOLIDATED COMPLAINT AND CROSS-CLAIM

Defendant, WESTVACO CORPORATION ("Westvaco"), by its attorneys, Skadden, Arps, Slate, Meagher & Flom, answers the Unified And Consolidated Complaint (the "complaint") herein as follows:

1. Admits that the complaint purports to be a Unified And Consolidated Complaint pursuant to an Order of this Court filed on March 2, 1978 and the Stipulation dated May 16, 1978 and So Ordered on May 31, 1978 and denies knowledge or information sufficient to form a be-

lief as to the truth of the remaining allegations contained in Paragraph 1 of the complaint.

2. Denies each and every allegation contained in Paragraphs 2, 3, 4, 10, 11, 12, 13, 17, 18, 19, 20, 21, 22, 23, 24 and 25 of the complaint.

3. Denies each and every allegation contained in Paragraph 5 of the complaint except admits that the actions identified in Exhibit I to the complaint were transferred to this Court from the districts in which they were commenced pursuant to 28 U.S.C. § 1407, and the Opinion and Order of the Judicial Panel on Multidistrict Litigation, dated November 29, 1977 (*In re Corrugated Container Antitrust Litigation*, 442 F. Supp. 921 (Jud. Pan. Mult. Lit. 1977)).

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 6 of the complaint except admits that the names listed in Exhibit I to the complaint purport to be the names of plaintiffs in this litigation.

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 7 and 9 of the complaint.

6. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 8 of the complaint except admits that Westvaco is a Delaware corporation with its principal place of business in New York, New York and is engaged in the business of manufacturing and selling corrugated containers and corrugated sheets in certain geographical areas of the United States.

7. Denies knowledge or information sufficient to form a belief as the truth of allegations contained in Paragraphs 14 and 15 of the complaint and states that the description of the trade and commerce in corrugated containers set forth therein is inaccurate and incomplete.

8. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 16 of the complaint, except admits that Westvaco at various times during the period covered by the complaint has sold corrugated containers and corrugated sheets in certain geographical areas of the United States.

FIRST AFFIRMATIVE DEFENSE

9. The complaint fails to state a claim against Westvaco upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

10. The claims alleged in the complaint against Westvaco are barred in whole or in part by the applicable statute of limitations.

THIRD AFFIRMATIVE DEFENSE

11. Plaintiffs lack standing to assert a claim against Westvaco for damages or equitable relief.

FOURTH AFFIRMATIVE DEFENSE

12. The complaint does not allege an appropriate class action and this litigation is not maintainable as a class action.

FIFTH AFFIRMATIVE DEFENSE

13. Plaintiffs are not entitled to invoke the aid of any Court because they are guilty of unclean hands and have acted in bad faith.

SIXTH AFFIRMATIVE DEFENSE

14. Plaintiffs have been guilty of such laches as to preclude them from invoking the aid of any Court.

SEVENTH AFFIRMATIVE DEFENSE

15. The Court lacks jurisdiction over the person of Westvaco.

EIGHTH AFFIRMATIVE DEFENSE

16. Venue of this cause is improper.

NINTH AFFIRMATIVE DEFENSE

17. By virtue of settlements entered into between plaintiffs and other defendants, plaintiffs have waived that portion of their claims for damages fairly allocable to the settling defendants.

CROSS-CLAIM AGAINST SETTLING DEFENDANTS

18. Each of the corporations named in this paragraph are defendants in the *Corrugated Container Antitrust Litigation*, MDL 310, having been named as defendants in the Consolidated Complaint, and having been named as defendants in one or more of the predecessor complaints in the consolidated actions. Each of these corporate defendants at all times mentioned in the complaint and in this answer were and are corporations duly organized under the laws of their respective states of incorporation as listed below.

Name of Defendant	State of Incorporation
Boise Cascade Corporation	Delaware
Champion International Corporation	New York
The Chesapeake Corporation of Virginia	Virginia
Container Corporation of America	Delaware
The Continental Group, Inc.	New York
Corco, Inc.	Ohio

Name of Defendant	State of Incorporation
Diamond International Corporation	Delaware
Dura-Containers, Inc.	Delaware
Green Bay Packaging, Inc.	Wisconsin
Hoerner Waldorf Corporation	Delaware
Inland Container Corporation	Indiana
International Paper Company	New York
Longview Fibre Company	Delaware
MacMillan Bloedel, Inc.	Alabama
MacMillan Bloedel Containers, Inc.	Delaware
Menasha Corporation	Wisconsin
Olinkraft, Inc.	Delaware
Owens-Illinois, Inc.	Ohio
St. Joe Paper Company	Florida
St. Regis Paper Company	New York
Stone Container Corporation	Illinois
Union Camp Corporation	Virginia
U.S. Corrugated-Fibre Box Company	Indiana
Western Kraft East, Inc.	Oregon
Weyerhaeuser Company	Washington
Willamette Industries, Inc.	Oregon

19. The defendant corporations named in paragraph 18 hereof ("the Settling Defendants") have entered into proposed settlements ("Settlements") of the cause of action alleged in the complaint which Settlements are being submitted to the Court for approval.

20. John Doe, Inc. and Richard Roe, Inc. are defendant corporations presently unknown to Westvaco which may have entered into proposed settlements of which Westvaco is presently unaware or may in the future enter into proposed settlements similar to those Settlements referred to in Paragraph 19 hereof.

21. Under the terms of the Settlements, plaintiffs and the Settling Defendants are requesting the Court to dismiss the complaint against the Settling Defendants and

to permit these actions to proceed against all other defendants (Non-Settling Defendants) including Westvaco.

22. With the possible exception of the Settling Defendants, the said *Corrugated Container Antitrust Litigation*, MDL 310, as alleged in the complaints is continuing against the Non-Settling Defendants therein.

23. In the unlikely event that at the conclusion of the said *Corrugated Container Antitrust Litigation* judgment in an amount presently unknown should be entered against Westvaco, then Westvaco is entitled to receive appropriate contributions from the Settling Defendants and John Doe Inc. and Richard Roe Inc.

24. By entering into the settlements, the Settling Defendants are attempting to avoid their obligations to make appropriate contributions to Westvaco, as alleged in paragraph 23 hereof, in the unlikely event plaintiffs, after trial, should obtain a judgment against Westvaco.

25. Westvaco has previously advised the Settling Defendants that it intends to hold said defendants liable for their appropriate contributions to Westvaco as set forth in this cross-claim.

WHEREFORE, defendant Westvaco Corporation demands:

A. Judgment dismissing plaintiffs' complaint herein with prejudice together with the costs and disbursements of this action including reasonable attorneys' fees, and such other and further relief as this Court may deem just and proper; and

B. Judgment against the Settling Defendants, John Doe, Inc. and Richard Roe, Inc. (i) for their respective appropriate contributions to Westvaco in the event there is any liability to plaintiffs by Westvaco, (ii) for costs and disbursements of this cross-claim including reason-

able counsel fees and (iii) for such other and further relief as this Court may deem just and proper.

Dated: February 27, 1979

SKADDEN, ARPS, SLATE, MEAGHER & FLOM

By /s/ *Leslie H. Arps*
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IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. No. 310

IN RE: CORRUGATED CONTAINER
ANTITRUST LITIGATION

This document relates to:

ALL ACTIONS EXCEPT

CANTRELL AND COCHRANE, INC.
(C.A. No. H-79-87)
DEAN FOOD COMPANY, ET AL.
(C.A. No. H-78-2004)
DRAPER-KING COLE, INC., ET AL.
(C.A. No. H-78-1226)
FRANKLIN CONTAINER CORP., ET AL.
(C.A. No. H-78-671)
IOWA BEEF PROCESSORS, INC., ET AL.
(C.A. No. H-78-1263)
ITT CONTINENTAL BAKING CO.
(C.A. No. H-78-376)
SUNMARK, INC.
(C.A. No. H-78-1815)
UNITED FARMERS COOPERATIVE, INC., ET AL.
(C.A. No. H-77-2158)
UNITED FOODS, INC., ET AL.
(C.A. No. H-78-4)

MOTION OF CLASS PLAINTIFFS FOR PRELIMINARY APPROVAL OF SETTLEMENTS

Filed April 16, 1979

Pursuant to Rule 23(3) [sic] of the Federal Rules of Civil Procedure and Section 1.46 of the Manual for Complex Litigation, the class plaintiffs in this litigation respectfully move that this Court grant preliminary approval of each and every proposed settlement currently

on file in this case so that notice of those settlements may be given to class members along with notice of class certification. The grounds for this motion are set forth more fully in the accompanying Memorandum. As that Memorandum shows, each and every settlement is well within the range of possible approval. All those settlements should therefore be conditionally approved.

WHEREFORE, class plaintiffs respectfully pray that their motion be in all respects granted.

Respectfully submitted,

[See Joint Appendix, pages 196-97 for list of counsel]

[Caption Omitted]

MEMORANDUM OF CLASS PLAINTIFFS IN SUPPORT OF THEIR MOTION FOR PRELIMINARY APPROVAL OF ALL SETTLEMENTS

NOTE

This Memorandum and the Exhibits refer to or contain copies of documents that are marked "Confidential Pursuant to Court Order in MDL 310, U.S. Dist. Ct., S.D. Tex."

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[Caption and Title Omitted]

Plaintiffs have moved for conditional approval of the twenty-two proposed settlements currently on file in this litigation so that the class notice may refer to those settlements. As this memorandum explains in some detail,* each settlement individually—as well as the group of settlements in the aggregate—is well within the range of possible approval by this Court. For that reason, all settlements currently on file should be preliminarily approved for purposes of notice.

PRELIMINARY STATEMENT

The settlements before the Court for conditional approval total $298,057,370, and represent the largest partial or total settlement amount ever obtained in any class action at any stage of the litigation.** These settle-

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* In paragraph 1 of P.T.O. No. 7, this Court stated that approval of the St. Regis and International Paper Company settlements would require "estimates as to damages [and] probability of success on liability . . ., reliable data establishing the relative ability of settling and non-settling defendants to respond in damages, [an] estimate of fees and costs. [and an] outline of how the settlement fund would be distributed among class members." This memorandum supplies that information, as well as other information, respecting twenty-two proposed settlements. Plaintiffs' expert's estimate as to damages is set forth in Exhibit B. Plaintiffs' estimate as to probability of success on liability is discussed at pp. 26-28, 35-38, *infra*. The relative ability of settling and non-settling defendants to respond in damages, while arguably largely mooted by the achievement of a partial settlement totalling $298.2 million with twenty-two of the thirty-seven defendants, representing 80% of the defendants' share of the relevant market, is addressed in Exhibit C. Plaintiffs' estimate of fees and costs is presented at pp. 45-47, *infra*. The proposed plan of distribution and allocation is treated at pp. 43-45, *infra*.

** Attached hereto as Exhibit A is a chart showing pertinent data as to the terms of each of these settlements. One significant term common to all these settlements is that the

ments were obtained prior to the commencement of depositions, prior to the commencement of the companion criminal trial, and most importantly, prior to the incurring by the class beneficiaries of substantial attorneys' fees and litigation expenses.* The first ten million dollars in settlements were achieved prior to class certification, the next sixty-eight million dollars while such certification was being vigorously challenged in the Court of Appeals, and the remainder—in excess of two hundred million dollars—while there was pending in Congress, with predictions of passage, a bill that would overrule *Hanover Shoe* and *Illinois Brick* and thus substantially jeopardize or limit the rights of the direct purchaser sub-classes to recover any damages from the defendants.

On these grounds alone, it should be beyond peradventure that these settlements are worthy of both conditional and final approval by this Court. But that is not all. The negotiations leading to the proposed settlements were conducted with express court approval, in

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sales of all Settling Defendants remain in the case for the purpose of assessing damages against the Non-Settling Defendants. The Non-Settling Defendants collectively seem quite capable of responding in damages to an amount in excess of what plaintiffs' expert estimates to have been the total overcharge by Settling Defendants during the four-year limitation period. See Exhibit C *infra*, indicating that the Non-Settling Defendants have an aggregate net working capital of $1502.0 million. See Exhibit B, *infra*, setting forth plaintiffs' expert's estimate of overcharges by the Settling Defendants for the four-year period in the range of $185.8 million to $789.0 million.

* All settlement funds are currently drawing interest at the rate of approximately 10% per annum (see Exhibit D) and it is clear that this interest alone will more than cover the attorneys' fees and expenses incurred in the prosecution of this case.

utmost good faith, and at arms' length. The settlements are supported by the vast majority of class plaintiffs—both designated and reserve representatives—and their experienced counsel. In addition, the aggregate settlements represent a healthy percentage of the highest estimate of the overcharges made by Settling Defendants to the class, even though plaintiffs would appear to have been confronting a substantial task in achieving that potential recovery for the class by litigating against the Settling Defendants. Moreover, on top of creating the substantial settlement funds, the settlement agreements on file protect the settling sub-classes against *Illinois Brick* legislation and other adverse contingencies. The settlements are therefore more than fair, adequate and reasonable. They should be preliminarily approved.

STATEMENT

I.

Course Of The Litigation: Chronology

In March, 1977, the first of the class actions that were to become M.D.L. No. 310 were brought.* Thereafter other class actions were filed in the Southern District of Texas, the Northern District of Illinois, and other federal courts in several states. On November 29, 1977, the Judicial Panel on Multidistrict Litigation entered an order consolidating thirty-seven actions as M.D.L. No. 310 in the Southern District of Texas. The complaints in these actions alleged that the defendants and various co-conspirators had engaged in a nationwide conspiracy to fix, raise, maintain, and stabilize the prices of corrugated containers beginning some time before 1960. All

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* *Adams Extract Co., et al* v. *Alton Box Board Co., et al; Douglas Furniture Corp.* v. *Alton Box Board Co., et al.; Wittek Golf Supply Co., Inc.* v. *Alton Box Board Co., et al.*

but one of the thirty-seven cases were class actions. The Panel later transferred other actions to be consolidated as part of M.D.L. No. 310, which presently comprises fifty-two actions against thirty-seven corporate defendants.

In December 1977, this Court constituted Plaintiffs' Steering Committee (P.T.O. No. 2) and ordered the establishment of plaintiffs' and defendants' document depositories (Practice and Procedure Order, Dec. 21, 1977). On February 13, 1978, plaintiffs moved to compel defendants in M.D.L. No. 310 to place in defendants' depository the 1.5 million to 2 million documents that had been produced in response to subpoenas of Houston federal grand jury that had begun an antitrust investigation of the corrugated container industry in December, 1975, and had returned indictments in January 1978 against fourteen of the thirty-seven corporations named as defendants herein. This Court granted that motion on April 14, 1978 (P.T.O. No. 3). Plaintiffs promptly began a coordinated program of inspecting and classifying those documents, which was completed by December, 1978. It should be pointed out that plaintiffs were permitted no discovery before the order of April 14th (See P.T.O. No. 4, Aug. 1, 1977; Practice and Procedure Order, Dec. 21, 1977). In October, 1978, plaintiffs gained access to the Government's trial exhibits. The grand jury documents, the trial exhibits, private investigation, and publicly—available information about the corrugated industry constituted the information base plaintiffs have had to work with.*

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* A series of postponements of merit discovery, necessitated by the criminal proceedings, have occurred. Most significantly, plaintiffs have not been allowed to communicate with government trial witnesses (P.T.O. No. 6, Nov. 16, 1978) nor to take depositions during the period when these settlements were being negotiated and concluded.

In July and August, 1978, plaintiffs reached settlement agreements with defendants St. Regis Paper Company ($1,700,000) and International Paper Company ($8,300,000).

On September 6, 1978, this Court certified a class of plaintiffs consisting of "all persons in the United States (excluding defendants and all subsidiaries and affiliates of defendants and all independent corrugated box manufacturers) who purchased corrugated containers or corrugated sheets from any defendant, or any subsidiary or affiliate of any defendant, at any time during the period from January 1, 1960, to January 25, 1978." Thereafter, on December 26, 1978, P.T.O. No. 7 carved out of the original class a "Sheet Plant Sub-class." On December 29, 1978, the Court of Appeals for the Fifth Circuit denied defendants leave to file a petition for a writ of mandamus directed to the class certification order of September 6, 1978.

By December, 1978, most of the corporate and individual defendants in the criminal case had entered nolo contendere pleas and been sentenced. The criminal trial against the remaining two corporations and seven individuals was scheduled to begin on January 15, 1979. During December and January, before the criminal trial began, plaintiffs concluded separately negotiated settlement agreements with twenty of the M.D.L. No. 310 defendants. Ten of these defendants had not been criminally indicted. Settlements with these unindicted defendants aggregated $51,568,870. The five defendants indicted for misdemeanors settled for a total of $105,738,500. The five felony defendants settled for a total of $130,750,000. Settlements achieved in December and January totaled $288,057,370.

Hence, by the time the criminal trial began on January 22, 1979, plaintiffs had settled with twenty-two of the thirty-seven defendants in M.D.L. No. 310 for a total of

$298,057,370.* Each settlement agreement was negotiated and concluded with the defendant on an individual basis. The settling defendants in the aggregate account for approximately 80% of the defendants' share of the relevant market. On the basis of their intensive review of more than 1.5 million grand jury documents, the Government's trial exhibits, industry studies by Arthur Anderson & Co. and the Fibre Box Association, informal investigations, consultations with their experts as to provable overcharges, and their collective experience in similar and related antitrust cases, plaintiffs' counsel had a sound working knowledge of their case as these settlement agreements were being reached. However, it is important to note that the settlements were obtained before the commencement of depositions, before the criminal trial began, and before the class beneficiaries had incurred substantial attorneys' fees and litigation expenses.

II.

History Of Settlement Negotiations

A. *Pre-Certification Settlements*

The history of the pre-certification settlements with St. Regis and International Paper ("IP") has already been set forth in the papers previously filed with this Court in support of such settlements.** After the St. Regis

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* While the following approach was not used in calculating the settlement value of this case, it is interesting that the $298.1 million settlements total represents 34.9 of the Settling Defendants' aggregate net pre-tax profits for the years 1973-76, inclusive. These are the years within the four-year statute of limitations period. See Exhibit B, Table 1, *infra*.

** Recently, when it became apparent that the expense of preparing a class notice list and giving notice to the class would be substantial and that notice of settlements would

settlement became public, plaintiffs were contacted by a number of indicted and unindicted defendants regarding the possibility of settlement, but none of these tentative overtures produced concrete offers substantially better than the Four Hundred Twenty-Eight Thousand ($428,000) Dollar per percentage point of defendants' share of the market paid by St. Regis.* In an effort to develop a strategy to break this logjam and determine a consistent pre-certification settlement value for the entire case, the Plaintiffs' Steering Committee held a meeting in New York City on August 9, 1978. The Steering Committee received a report on plaintiffs' review of the grand jury documents, the Government's recently filed Bill of Particulars, the history of settlement overtures, the possible impact of the Fifth Circuit's recent *Blue Bird* opinion, and the recommendation of the Plain-

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likely be included in the first notice to the class, plaintiffs asked St. Regis and IP whether they would agree to amend their settlements to provide that up to $400,000 of their settlement funds could be used, upon preliminary approval of the same, to defray these expenses. They have so agreed and an amendment to their settlement agreements is filed herewith. Plaintiffs now seek approval of their settlements as amended. This amendment obviously is of substantial value to the class.

* Plaintiffs were approached very early by Diamond and Dura, but the market shares of each were so small that the settlement amounts they were discussing could be regarded as "nuisance values" and would not, it was felt, have any impact on the other defendants. Plaintiffs were also approached during June and July by Mead, Boise-Cascade, International Paper and Champion. Mead unequivocally rejected the notion of paying substantially more than St. Regis. On June 10th, Boise offered $390 thousand per point, and on July 11th, IP indicated a willingness to pay $600 thousand per point and perhaps something more. No figures were mentioned during casual conversations with Champion's counsel.

tiffs' Ad Hoc Settlement Committee (hereinafter "AHSC"), which had available to it certain tentative damage projections by plaintiffs' economist, Dr. Richard Hoyt,* and by one of defendant's economists.** Some of the members of the Steering Committee thought the entire case had a pre-certification value of $100 million; others thought that value was at least $300 million; all agreed that something had to be done with at least one major indicted defendant to break the ice and that it was quite appropriate to offer a substantial discount to the first such defendant to do so. The highest offer plaintiffs had received from such a defendant was at the level of $800 thousand per point.*** After considerable debate, the Steering Committee unanimously agreed to consummate a settlement at the level of $1 million per percentage point of defendants' share of the market with one major indicted defendant.**** The Steering Committee

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* Dr. Hoyt, who became familiar with the case by virtue of his work on the class action issues, had been asked in July, by the Chairman and Vice-Chairman of Plaintiffs' Steering Committee, to commence estimating the possible magnitude of the alleged overcharges.

** On June 10, 1978, and again on August 9, 1978, members of the AHSC met with counsel for Boise-Cascade and an independent economist, who had done certain damage studies on its behalf, to discuss possible settlement. The economist explained his methodology in arriving at a maximum overcharge of around $170 million for the four-year period prior to suit.

*** The offer came from Boise-Cascade on the morning of the Steering Committee meeting.

**** The Steering Committee also agreed that IP was a logical candidate. First, it had already indicated a willingness to pay more than $600 thousand per point. Second, its substantial market share would make the total amount of the settlement a figure that would more likely have an impact on

also resolved that all further pre-certification settlements would be at the level of $3 million per point for indicted defendants and $2 million per point for unindicted defendants.

From August 14th through August 25th, the AHSC was involved in continuous negotiations with counsel for IP over the terms of the IP agreement, the amount of which had been agreed to on August 11th.* On August

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the remaining defendants, many of whom were taking a wholly unrealistic view of the settlement value of the case. Third, as a felony indictee, I.P. had been charged with violations during the entire damage period and, therefore, securing its commitment to cooperate in providing documents and information would be more valuable than securing a similar commitment from either an unindicted defendant or from a misdemeanor-indicted defendant not alleged by the Government to have been involved in illegal conduct after December 21, 1974. The last two considerations, made Boise-Cascade a less worthy candidate for receipt of the one threshold settlement the Steering Committee was prepared to offer.

* One initial hurdle in the negotiation of the IP agreement was the calculation of the settlement amount. Using IP's average share of total industry shipments in board feet for 1972-1976, as reported in the Fibre Box Association publications, plaintiffs calculated that IP's shipments in feet accounted for 5.97% of all shipments in feet. (Sales figures in dollars for other defendants and non-defendant FBA members were unavailable.) IP agreed with this calculation, but disagreed with plaintiffs' calculation of IP's share of the defendants' share of the market. During negotiations with St. Regis, plaintiffs had been shown documents indicating that defendants accounted for 72% of the entire market and had therefore calculated each defendant's share of defendants' portion of the market by dividing that defendant's share of the entire market by .72: *e.g.*, in IP's case, 5.97% ÷ .72 = 8.3%. Counsel for IP pointed out that plaintiffs had failed to include shipments by some defendants in the defendants'

15th, counsel for Container Corporation ("CCA") met with representatives of the AHSC in Houston and indicated that CCA might be willing to meet the IP offer of $1 million per point. CCA rejected out of hand plaintiffs' suggestion that it pay $3 million per point.*

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market share and that the defendants' true share of the entire market was in fact 77%, with IP accounting for 7.75% of that amount (5.97% ÷ .77). While plaintiffs recognized that IP's posture was not without merit, they also sought to maximize the settlement and insisted that their $1 million per point offer be applied to their 8.3% calculation. IP agreed, but only upon the condition that for purposes of future settlements, plaintiffs would continue to calculate defendants' share of the market at 72%. Plaintiffs agreed, and accordingly have calculated all other settling defendants' market shares by dividing their shares of the total market by .72. While this has had the effect of treating all defendants alike in assessing relationships to each other in terms of shipments, it has also had the effect of understating what each settling defendant has paid per point. For example, Exhibit A reflects that Weyerhauser accounted for 7.83% of defendants' share of the market and paid $5 million per point, while in fact Weyerhauser accounted for 7.32% of defendants' share of the market and paid $5.348 million per point.

* In so doing, not only did counsel for CCA recite the standard arguments advanced by defendants in opposition to certification, but he also emphasized: (1) the CCA employees named by the Government as co-conspirators were all plant-level employees with local responsibilities only; (2) unlike IP, CCA was a misdemeanor indictee and, given the prominent role CCA had played in *United States* v. *Container Corporation*, the Government would certainly have indicted it for a felony had there been any hint of post-1974 involvement; (3) having been the named defendant in the earlier civil case, CCA's limitations defense would be difficult to overcome by claims of fraudulent concealment.

B. *The Post-Certification Stalemate*

On September 6, 1978, the Court filed its class certification order. On September 8th and 12th, counsel for Willamette, Continental Group and Diamond called the Chairman of Plaintiffs' Steering Committee, Mr. Susman, to explore settlement. In each case, Mr. Susman informed counsel that the authority of the AHSC to settle at the $3 million indicted/$2 million unindicted level had expired with class certification and that the Steering Committee was scheduled to meet on September 19th to revise its settlement guidelines. At that meeting, after considerable debate,* the Steering Committee unanimously

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* In addition to the usual reasons given for increasing settlement demands after certification, there were several additional factors that caused the Steering Committee to consider the agreed-upon increase warranted. First, plaintiffs were beginning to hear about the amounts at which settlements were being discussed and negotiated by some of the same defendants in the *Folding Cartons* case, involving a smaller amount of commerce than the corrugated industry. Second, the criminal trial was then scheduled to commence in a matter of weeks, and plaintiffs believed this might put additional pressure on defendants to settle. Finally, the members of the Steering Committee were divided in their evaluation of the realistic value of the case and yet all agreed that at that time unanimity was essential on matters of settlement. At the same time, the Steering Committee felt it would be irresponsible to take the position that no amount of money would then be acceptable in settlement. If anything, the guidelines adopted on Sept. 19th were an effort to set a value on the case that would satisfy even the most bullish members of the Steering Committee: few had any hope that settlement could be achieved at these "show-stopping" levels, and many were content to discourage all further settlements until more could be learned.

agreed to raise the post-certification guidelines to $5/$3 million per point.*

From September 19 through December 5, various defendants (Continental Group, Diamond, Dura, Weyerhaeuser, Union Camp, CCA, Owens-Illinois and PCA) contacted Mr. Susman regarding settlement possibilities. Mr. Susman informed them of the settlement guidelines adopted by the Steering Committee on September 19th, but indicated that the plaintiffs might entertain offers lower than those guidelines as long as they were substantially better than the IP formula. He also reiterated the obvious: plaintiffs were prepared to give consideration for reduced settlement rates per percentage point to earlier settlers. These defendants, characterizing plaintiffs' demands as preposterous, uniformly refused to come forward with such offers, and some (Continental Group on October 3, and Owens-Illinois and Weyerhaeuser on October 13) actually wrote Mr. Susman suggesting that they would be willing to settle only at the IP level of $1 million per point. If the plaintiffs could not then see the writing on the wall, the indicted defendants' united course of action became perfectly clear when counsel for Inland Container, on December 6, 1978, just a week before the scheduled hearing to determine whether the IP and St. Regis settlements should be preliminarily approved, wrote the Court, on behalf of all indicted defendants, requesting an off-the-record in chambers conference to explore the possibility of a group settlement using the IP formula as a benchmark.

On December 5, the day before plaintiffs received the letter from counsel for Inland, counsel for Dura, Diamond, PCA and Weyerhaeuser contacted Mr. Susman to

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* It should be noted that the post-certification settlements to date average $4.88 million per point for indicted defendants and $2.74 million per point for unindicted defendants.

explore the possibility of settlement. Mr. Susman responded that he was still bound by the Steering Committee's guidelines adopted in September, but that he would check further with the Steering Committee to determine whether there was any desire on its part to depart from these guidelines in view of the recent filing with the Fifth Circuit of a Petition for Writ of Mandamus directed to this Court's class certification decision. A Steering Committee conference call was held at midday on the 5th to explore this possibility, but the Steering Committee determined to make no departures from its settlement demands until after it could meet on January 9th to fully review the narrative reports that were then being prepared by each of plaintiffs' discovery subcommittees based upon their review of each defendant's grand jury documents. Plaintiffs' counsel also needed time to complete their evaluation of the information contained in the Government's trial exhibits for the criminal trial, which had been obtained in mid-October. Immediately after this Steering Committee conference call was concluded, Mr. Susman received a call from counsel for Union Camp requesting a meeting to explore settlement. At first, counsel for Union Camp raised the possibility of a group settlement with the unindicted defendants. Mr. Susman reiterated the Steering Committee's demand of $3 million dollars per point, expressed doubt that any group negotiations would be fruitful at that level, but stated that an offer from a single unindicted defendant in excess of the $1 million per point paid by IP might get the attention of at least some members of the Steering Committee. The next day (the same day the letter from counsel for Inland was received), counsel for Union Camp met with Mr. Susman and an associate in Houston to discuss the matter further. During that meeting, counsel for Union Camp stated that while he had no authority to offer even $1 million per point, he might consider recommending that amount to his client in view

of the fact that Union Camp was about to conclude a year of profitable operations and therefore its management was anxious to dispose of the case during 1978 if at all. He also argued that plaintiffs demands were so high that a stalemate was created and that if it continued, the unindicted defendants would be forced to band together as a group in the same way that the indicted ones had apparently done. At the conclusion of the meeting, Mr. Susman stated he would again raise the matter with the Steering Committee.

C. *The Union Camp Ice-Breaker*

On December 7, members of the Steering Committee held another conference call. During that call, the Steering Committee determined to proceed with negotiations with Union Camp at a substantial multiple of the St. Regis settlement.* Not only was the Steering Committee concerned about the pending Petition for Writ of Mandamus and the threat of *Illinois Brick* legislation during the session of Congress beginning in January, but the Steering Committee was particularly concerned about the indicted defendants' announced effort to pressure plaintiffs into a settlement with them at the IP benchmark. Furthermore, by virtue of comments made by counsel for Union Camp, plaintiffs feared that the unindicted defendants were being pressured by the existing stalemate to coalesce into a negotiating group that might virtually halt further individual settlements. It was felt that a settlement with an unindicted defendant at a level four to five times greater than the St. Regis pre-certification settlement would readily establish the magnitude of the pre-certification discount and provide the plaintiffs with a new benchmark to be used for both indicted and unindicted defendants in post-certification settlements.

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* St. Regis settled for $428 thousand per point.

Immediately after the Steering Committee conference call, Mr. Susman called counsel for Union Camp and stated that the Steering Committee was willing to settle with Union Camp for $2 million per point. Mr. Susman further stated that if counsel for Union Camp had present authority to offer $1 million point, there was possibly some opportunity for fruitful negotiation. Counsel for Union Camp indicated that he had such authority and accordingly on December 10, counsel for Union Camp and members of the AHSC (plus the plaintiffs' principal discovery attorney for Union Camp) met in Houston and for the next three days were engaged in continuous negotiations over terms of a settlement agreement. That negotiation, which included a rather frank discussion of particular references to Union Camp in the grand jury documents, resulted in Union Camp's agreement to pay $2 million per point or almost five times the amount that St. Regis, also an unindicted defendant, had paid.* Since plaintiffs were acutely aware that the Union Camp agreement would set a model for post-certification settlements, virtually every clause thereof was subject to strenuous negotiation, particularly since Union Camp, having paid twice the amount per point as IP, an indicted defendant, initially asked for provisions at least as favorable as those contained in the IP settlement agreement. Plaintiffs were particularly concerned about five areas of initial disagreement. First, plaintiffs insisted that Union Camp's sales

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* During the negotiations with Union Camp, plaintiffs discovered that Union Camp had a wholly-owned subsidiary, Allied Container Corporation, that manufactured corrugated containers and sheets and that reported its shipments separately to the FBA. Though Allied had not been named as a defendant, plaintiffs insisted that its market share be added to Union Camp's in calculating the settlement amount. This resulted in the payment of an increased amount by Union Camp and also set a precedent for subsequent settlements.

not be removed from the case so that the remaining defendants would be jointly and severally liable for any overcharges attributable thereto, less only the amount paid by Union Camp in settlement. Second, plaintiffs were unwilling to give Union Camp an option to terminate the agreement in the event that *Illinois Brick* legislation were to be enacted during the coming year.* Third, in light of the pending petition for Writ of Mandamus, plaintiffs were insistent that the Union Camp settlement not be conditioned on the continued vitality of this Court's class certification decision. Fourth, plaintiffs were unwilling to accord to Union Camp the right, accorded to St. Regis and IP, to terminate the settlement if it were dissatisfied with the magnitude of opt-outs.** Finally, plaintiffs were unwilling to accord to Union Camp a blanket "most-favored nations" provision that would have prevented plaintiffs from ever settling with

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* Considerable time was spent in negotiating paragraph 14 of the Union Camp agreement in order to avoid the consequences to plaintiffs of the IP-type *Illinois Brick* termination provision and yet give Union Camp some protection in the event legislation conferred standing on indirect purchasers, a class of such purchasers was certified, and the Court deemed it proper to allocate a certain portion of the settlement fund to such class.

** Paragraph 13 of the Union Camp agreement was the result of many hours of negotiation and became the model for future settlements, except that in future agreements plaintiffs insisted on and obtained higher opt-out percentages. From the plaintiffs' standpoint, the crucial feature of paragraph 13 was that it required not only a certain level of opt-outs but also a certain level of suits actually filed by opt-outs in order for the settling defendant to have the right to terminate. From experience in other cases, plaintiffs anticipated a certain amount of opt-outs, but felt that very few of the opt-out purchasers would actually go so far as to file suit.

other defendants on more favorable terms.* Plaintiffs overcame Union Camp's initial objections to all of these points, and on December 12th, an agreement was concluded to the satisfaction of plaintiffs on each of them.**

D. *The Fall-Out From The Union Camp Settlement*

On December 13th, the Court held an off-the-record conference with counsel for plaintiffs and counsel for the

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* Paragraph 16 of the Union Camp agreement (that also became a standard clause in the subsequent settlements) was carefully designed (a) to give the Union Camp's counsel the assurance that he would not be embarrassed by closely contemporaneous settlements more favorable to other defendants, similarly situated, simply because their attorneys were better negotiators and, at the same time, (b) to leave plaintiffs the freedom to recognize legitimate differences among defendants (as to culpability and the ability to pay) and material events (including factual revelations and changes in applicable law) that might unfold and affect the prospects of recovery as both the criminal and civil proceedings progressed. Paragraph 16 was carefully designed to avoid those criticisms that the *Manual for Complex Litigation*, pp. 62-64, directs at the usual "most-favored nations" clause.

** The only extent to which the Union Camp agreement is more favorable to defendant than was the IP agreement is in the provisions for discovery cooperation (see ¶ 15 of both agreements). While the plaintiffs insisted upon more cooperation than Union Camp was initially ready to agree to, plaintiffs were willing to relieve Union Camp of some of the obligations imposed on IP. First, it was by then not totally clear what materials the Court would allow IP to turn over to the plaintiffs in view of the strenuous objections of the non-settling defendants to paragraph 15 of the IP agreement. Second, plaintiffs did not anticipate that Union Camp, as an unindicted defendant, would have available any investigative materials that could not be obtained, with court approval, from IP.

indicted defendants in response to the request of counsel for Inland and over the strenuous objections of plaintiffs. During the course of that conference, a spokesman for the indicted defendants stated that what was fair for IP was fair for the remaining indicted defendants, that they wanted to negotiate as a group, but that they would not pay even $2 million per point. In response, counsel for plaintiffs disclosed that plaintiffs had recently concluded a settlement with an *unindicted* defendant at that very level. Plaintiffs suspect that it was that announcement, that caused a number of defendants to commence serious settlement negotiations with plaintiffs.

Commencing immediately after the December 13 of-the-record conference,* plaintiffs' counsel met on that afternoon with counsel for CCA, Champion, and one representative who purported to speak on behalf of a group of virtually all unindicted defendants. Remembering the warning of counsel for Union Camp, plaintiffs' counsel were most concerned about the fact that the unindicted defendants had apparently coalesced into a negotiating group. And when the spokesman for the unindicted defendants offered a package amount that would have resulted in the unindicted defendants paying less than the $2 million dollars per point already agreed to by Union Camp, it became obvious to plaintiffs that they should disclose to these defendants two pertinent facts: (1) that Plaintiffs' Steering Committee had ranked each unindicted defendant in terms of culpability and

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* The Court did make several statements that guided plaintiffs in formulating their subsequent settlement demands: (1) the plaintiffs must strive for the maximum dollar recovery at minimum expense; (2) as the litigation progresses, the expenses to the class increase and settlement amounts have to go up too; (3) the Court, in approving settlements, will look at the net dollars to the class and not the net dollars to plaintiffs' attorneys.

had set a price tag for each at between $2 million dollars and $4 million dollars per point; and (2) that, as in the past, the earlier settlers would be given some discount over the later ones. After another unsuccessful meeting with a spokesman for the unindicted defendant group on December 14th, the group effort apparently collapsed and that afternoon plaintiffs' counsel met separately with counsel for Diamond, Dura, Chesapeake, and Longview, respectively. At that time, settlements were negotiated with Dura and Diamond at the $2 million dollar per point level (*i.e.*, with no increase from the Union Camp level) primarily because of their small market shares. In addition, both had seriously discussed settlement prior to certification, and both were willing to forego any *Illinois Brick* or opt-out protection.*

On December 16th, the Plaintiffs' Steering Committee again held a conference call to review the events of the last several days. While the Steering Committee would have preferred more time for careful deliberation and greater availability of hard economic data, the amounts being offered by defendants were clearly approaching the range of the guidelines set by the Steering Committee in September, and the Steering Committee was mindful not only of the pending mandamus petition, but also of this Court's admonition, on December 13th, that the class representatives should keep firmly in mind not only

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* At the same time, plaintiffs' counsel met with counsel for Interstate. Unlike the other unindicted defendants, Interstate stated it lacked the resources to pay what plaintiffs were demanding. Similar claims of hardship have been made by Consolidated Packaging and Alton. With the co-operation of each, independent accounting firms employed by plaintiffs have evaluated these claims through review of requested financial information and interviews with management. The results of such evaluations are now being considered by Plaintiffs' Steering Committee.

the dollars involved in settlements but the expense to the class through years of litigation in producing such dollars.* After full consideration of all these other factors, the Steering Committee approved pursuing settlement negotiations with unindicted defendants in amounts ranging from $2.4 million dollars to $4 million dollars per point. It was also agreed that some effort should be made to break up the logjam that would be created if the indicted defendants continued to insist on group negotiations at the levels that counsel for Inland had insisted upon on December 13th (less than $2 million dollars per point).** For the first time, plaintiffs decided to differentiate between those defendants indicted for misdemeanors and those indicted for felonies and to seek $4 million per point from misdemeanor defendants and $5 million per point from felony defendants. It was also decided that, to break up the group effort, the first post-certification settling misdemeanor defendant should be offered $3.5 million per point and the first post-certification settling felony defendant, $4.5 million per point. Finally, it was decided to extend these offers to Boise-Cascade and Champion, respectively, since they had been the first de-

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* Plaintiffs were also keenly aware that the Westvaco motion to file cross-claims for contribution against IP and St. Regis (filed on Dec. 11, 1978) would, if granted, have a devastating effect on plaintiffs' ability to settle with individual defendants in the future, particularly if plaintiffs continued to insist that the settling defendants' sales not be removed from the damage universe. On December 14th, counsel for Inland, pointing to the fact that the issue of contribution was pending in three courts of appeals, argued the necessity to remove the St. Regis and IP sales from the case as a condition to approval of those settlements.

** On December 14th, the spokesman for the indicted defendants wrote plaintiffs requesting an early meeting to explore the possibility of a group settlement.

fendants in each category to seriously discuss settlement with plaintiffs.

During the week of December 18th, settlements were negotiated with several unindicted defendants: Chesapeake (at $2.4 million per point), Longview (at $2.5 million per point), Willamette (at $2.7 million per point), and Menasha (at $2.75 million per point). Boise-Cascade, a misdemeanor indictee, settled at $3.5 million dollars per point, and Champion, a felony indictee, at $4.5 million dollars per point. During the same period, plaintiffs received further overtures from counsel for CCA and counsel for Weyerhaeuser.

In order to be better able to evaluate these overtures as well as any offers that might be made by the indicted-defendant group, plaintiffs' counsel met on December 17th through the 20th with two economists: Dr. Richard Hoyt, who had previously worked on damage estimates, and Professor Jeffrey Harrison, a Ph.D. economist with the University of Houston School of Law, who was retained at that time to assist Dr. Hoyt. In an effort to further refine an estimate of potential actual damages, these economists were instructed to have a report ready for Plaintiffs' Steering Committee when it met on January 5th to set further settlement guidelines.

E. *The Post-January 5th Settlements On Behalf of the Container Purchaser Sub-Class*

All settlements before Christmas had been negotiated on behalf of the entire class of purchasers of corrugated containers and sheets that had been certified by the Court in early September. While Great Northern Packaging had filed a motion to create a Sheet Plant sub-class, the Court did not take any formal action on this motion until December 26th. Therefore, all pre-Christmas settlements were negotiated with the full consent and participation of counsel for Atlas Container (the only sheet

plant among the then designated class representatives) on behalf of both container purchasers and sheet plants. The overall amounts seemed well within the range of reasonableness, and the Steering Committee and the designated class representatives recognized that they would later have to work out an allocation formula between any sub-classes the Court might create. A majority of the class representatives, including Atlas Container, and a majority of the members of the Steering Committee also felt it was entirely proper to conduct joint negotiations on behalf of the entire class, at least until such time as the Court might formally create a Sheet Plant sub-class with additional class representatives. On December 26th, the Court entered an order creating such a sub-class and designating Atlas Container Co., Inc. (represented by Mr. Montague) and Great Northern Packaging Corp. (represented by Mr. Hartunian) as representatives of that sub-class.

From December 26th to January 5th, plaintiffs declared a moratorium on settlement negotiations and so informed the defendants who were inquiring about the possibility of settlement. Plaintiffs needed time to discuss possible allocation problems with the Sheet Plant sub-class representatives and to conduct a full Steering Committee meeting devoted to the question of settlement. Plaintiffs informed counsel for CCA and counsel for Weyerhaeuser that plaintiffs would meet with them to discuss settlement on January 6th after the meeting of the Steering Committee on January 5th. Plaintiffs also informed counsel for Inland that they would meet with the indicted defendants as a group on January 9th.

On January 4th, the members of the AHSC met with Professor Harrison and Dr. Hoyt to discuss their preliminary damage estimates. The actual damages then estimated by plaintiffs' experts during the four-year period preceding the filing of these lawsuits were $733

million.* Members of the AHSC also calculated that if all defendants had uniformly inflated the price of corrugated containers and sheets 4% across the board (and plaintiffs' counsel doubted it could have been more in view of the nature of the industry and counsel's experience in similar cases), the actual overcharge to *all* customers for a four-year period before filing the suit would have amounted to $490 million. All these calculations and the liability evidence as to each defendant were thoroughly discussed at the Steering Committee meeting on January 5th, and the Steering Committee, at the conclusion, set settlement demands for each remaining defendant. If complied with, plaintiffs anticipated these demands would produce a total recovery for the class of approximately $363 million.**

At the Steering Committee meeting on January 5th, there was also some attempt to determine a fair allocation formula between the two sub-classes, but nothing definite was decided. Messrs. Montague and Hartunian expressed the view that it would be inappropriate to proceed with joint negotiations until the Sheet Plant subclass could determine the amount it wanted to obtain in settlement from each remaining defendant. A majority of the Steering Committee and a majority of the designated representatives of the Container Purchaser subclass agreed that neither the Steering Committee nor the Container Purchaser representatives could continue to

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* This figure involved all sales of all corrugated products by all defendants to all customers; it did not exclude those sales to the large customers who had already filed their own individual lawsuits and would thus probably not elect to participate in any class settlement.

** Plaintiffs were acutely aware that such a fund, banked at this time, would at current interest rates grow to almost $440 million within two years, the period of time it would probably take to prepare this case for trial.

negotiate on behalf of the Sheet Plant sub-class. They also felt very strongly that negotiations should proceed on behalf of the Container Purchaser sub-class alone. In the first place, commitments had already been made to a number of defendants to meet with them on January 6th and 9th. In the second place, the criminal trial was scheduled to begin on January 15th, and plaintiffs perceived this as putting considerable pressure on the defendants to settle.

Accordingly, on January 6th, various members of Plaintiffs' Steering Committee met with counsel for CCA and counsel for Weyerhaeuser to negotiate settlements on behalf of the Container Purchaser sub-class only. Since counsel for each of these defendants came to Houston knowing that misdemeanor and felony defendants had recently settled claims by both the Container Purchaser and Sheet Plant sub-classes for $3.5 and $4.5 million per point, respectively, they were dismayed to learn that the plaintiffs' representatives disclaimed any authority to settle for the Sheet Plant sub-class and demanded from them $4.0 and $5.0 million per point, respectively, in settlement of the claims of just the Container Purchaser sub-class. Indeed, it seemed that this would be an impossible obstacle to further negotiations. At first, counsel for CCA and Weyerhaeuser demanded a discount for the fact that they were obviously not going to be able to settle the entire case. The representatives of the Container Purchaser sub-class were unwilling to grant this discount. After considerable negotiations, plaintiffs compromised by offering to earmark a portion of the settlement funds for possible, but not necessary, allocation to the sheet plants upon application of that sub-class and approval by the Court. CCA and Weyerhaeuser agreed to the demands made by the Container Purchaser representatives and settlements with these defendants were agreed upon. The Container Purchaser

sub-class did not purport to settle any claims of the Sheet Plant sub-class and retained the freedom to contest any claims by the Sheet Plant sub-class to that portion of the settlement fund that in theory could be allocated by the Court to it.

On January 9th, counsel for the remaining indicted defendants (excluding Consolidated Packaging) met with representatives of the Container Purchaser sub-class to explore the possibility of a group settlement. Plaintiffs' counsel explained that plaintiffs' economists had been working on the matter for several weeks and that in view of their estimates of possible damages, plaintiffs had to obtain more than $150 million dollars in the aggregate from the eight indicted defendants present. The defendants made no offer on the 9th, but six of them (excluding Alton and Mead) returned the next day to offer plaintiffs $85 million dollars as a package deal. Plaintiffs replied that plaintiffs had to obtain $131 million dollars from the group of six in order to meet their projected total for the entire case. Defendants rejected this demand in the strongest of terms.

The same day, January 10th, plaintiffs had commenced negotiations of a settlement with McMillan-Bloedel. While counsel for McMillan-Bloedel initially sought to have his client treated the same as the last settling unindicted defendant, Menasha, which had paid $2.75 million per point, counsel for plaintiffs insisted that, based upon the number of trial witnesses and co-conspirators identified by the Government as being present or former employees of McMillan-Bloedel and upon references to McMillan-Bloedel in the grand jury documents, it should not be treated any more favorably than a defendant indicted for a misdemeanor. Since a settlement had just been completed with CCA at $4 million per point, plain-

tiffs demanded and obtained $4 million per point from McMillan-Bloedel.*

On January 11th, the group efforts of the indicted defendants collapsed in the same manner that the group efforts of the unindicted defendants had collapsed on December 14. Mr. Susman was contacted by counsel for Owens-Illinois and counsel for Olinkraft seeking meetings to discuss individual settlements. Settlements were concluded with both of these felony-indicted defendants at $6 million per point during negotiations in Houston the next day. On January 16th, settlement negotiations were commenced with the Continental Group and within several days, it had agreed to settle for $6.5 million per point. On January 18th, settlements were agreed to with the three remaining misdemeanor defendants, St. Joe, Stone, and Inland, at the level of $4.75 million per point. Thus individual settlements with each of the six members of the indicted defendant group produced a total of $129 million, only $2 million short of what plaintiffs had demanded of the entire group on January 9th and $44 million more than the group had offered at that time.

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* The McMillan-Bloedel settlement demonstrates the wisdom of the two key concepts of plaintiffs' settlement strategy: (1) individualization and (2) enhancement. By avoiding group settlements, plaintiffs were able to use the grand jury documents and Government trial exhibits to assess culpability of each defendant on an individual basis and thus recover more than would have been the case had the defendants settled as a group on some pro rata basis acceptable to the least culpable defendant in the group. By letting the defendants know that early settlers would be given credit for breaking the ice and for creating an interest-bearing bird-in-the-hand and that later settlers, though of equal culpability, would have to pay enhanced amounts to cover plaintiffs' loss of interest and expense of further litigation, plaintiffs were able to maximize recovery by providing defendants with the incentive to settle quickly.

It also resulted in these indicted defendants paying an average of $5.4 million per point compared to the $5 million per point maximum that plaintiffs had demanded from them from September 19 through December 1978.*

III.

The Criminal Trial

The Houston grand jury antitrust investigation of the corrugated industry that began in December, 1975, culminated in indictments, returned on January 25, 1978, against fourteen corporations and twenty-six individuals. The indictments charged defendants with participation in a conspiracy to fix, raise, maintain, and stabilize the prices of corrugated containers and corrugated sheets throughout the continental United States east of the Rocky Mountains. The conspiracy, an unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, allegedly began some time before 1960. The nine corporations and nine individuals indicted for felonies were charged with participating in the conspiracy until the date the indictments were returned. The five corporations and seventeen individuals indicted for misdemeanors were charged with participation in the conspiracy until some time before December 21, 1974.

The criminal trial against the two corporations and seven individuals who had not entered nolo contendere pleas began on January 22, 1979. Plaintiffs' Steering Committee arranged that one of plaintiffs' counsel be in daily attendance to monitor. On the basis of daily monitors' written reports and the daily transcripts, plaintiffs

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* During January 1979, settlements were also concluded with unindicted defendants U.S. Corrugated and Green Bay Packaging at $4 million and $3.25 million per point, respectively.

offer the following brief description of the evidence developed to date. Obviously, this Court is uniquely able to assess the impact of the criminal trial on the M.D.L. No. 310 plaintiffs' potential case. The following description is intended only to sketch plaintiffs' perspective.

The Government's case depended upon showing the existence of a single industry-wide price-fixing conspiracy in effect east of the Rocky Mountains. The key elements the Government sought to prove were: (1) frequent exchanges of price information between competitors; (2) a common understanding that prices thus exchanged would be honored; (3) a common purpose of producing anticompetitive effects. The Government indicated that it would not seek to show that anticompetitive effects were actually produced. (Government's Pre-Trial Brief, Jan. 17, 1979, p. 13.)

On March 14, 1979, the Government concluded its presentation in chief, having called thirty-two witnesses. These witnesses persuasively established that a very large number of exchanges of price information between competitors had occurred. There was very substantial evidence that, particularly within local market areas, prices were exchanged on the understanding, perhaps not explicitly stated but nevertheless clearly present, that competitors would honor each other's prices. Further, the Government presented some evidence showing that the understandings as to exchanging price information and honoring competitor's prices existed above the local market area level and suggesting the existence of an industry-wide conspiracy. On the other hand, some of the evidence points up the inevitable uncertainties facing plaintiffs' in litigation of this type. For example, there were indications in the testimony that each corrugated container market area is a separate competitive entity, not dependent upon other local market areas for the success of its pricing activities. Further, a key witness,

(David Marshall), whose evidence might have gone far toward connecting the alleged local market understandings into some kind of industry-wide scheme, may have developed credibility problems. (See Tr. Vol. 24, pp. 58-60.)

Plaintiffs feel that the evidence now available sharply supports the viability of their case. The evidence developed in the criminal trial will be a great assistance to plaintiffs' counsel. Of course, during the period when the instant settlement agreements were being negotiated and achieved, plaintiffs' had less information than is now available. The grand jury documents were helpful in educating plaintiffs' counsel as to the nature of the corrugated industry and the probable elements of the price-fixing conspiracy, but they did not afford any great amount of direct evidence of explicit conspiratorial contact. In October, 1978, plaintiffs obtained the Government's trial exhibits, including the centrally-important Marshall documents. These documents materially assisted plaintiffs' counsel in their settlement deliberations and negotiations. However, there was some doubt about the exact nature, degree of credibility, and, most significantly, admissibility of this data. Plaintiffs' counsel believed that, as to each settlement agreement concluded, the information then available strongly indicated adequacy, fairness, and reasonableness. The evidence produced by the criminal trial, while adding appreciably to the strength of plaintiffs' case, does not so overpoweringly rule out the contingencies inevitably present in a case like M.D.L. No. 310 as to suggest that it should not have been partially settled for nearly three hundred million dollars.

ARGUMENT

Rule 23(e) of the Federal Rules of Civil Procedure provides that class actions "shall not be . . . compromised without the approval of the court, and notice of the pro-

posed . . . compromise shall be given to all members of the class in such manner as the court direct." By their motion, plaintiffs do not at this time seek final approval under this provision for the settlements at issue. Instead, plaintiffs seek preliminary approval of the proposed settlements so that, in accordance with Rule 23(e), notice of the proposed settlements may be sent to the class members in this litigation. *See Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp.*, 323 F. Supp. 364, 372 (E.D. Pa. 1970), *aff'd sub nom. Ace Heating & Plumbing Co.* v. *Crane Co.*, 453 F.2d 30 (3d Cir. 1971).

In order to determine whether such conditional approval should be granted, the trial court need only determine whether there is "probable cause" for informing the class about the settlements; in essence, it must decide whether the settlements fall within the "range of possible approval." * Manual for Complex Litigation, ¶ 1.46. As Judge Bue has said, the trial court is to "examine the terms of the settlement and determine if the settlement appears reasonable on its face." *Magana* v. *Platzer Shipyard, Inc.*, 74 F.R.D. 61 (S.D. Tex. 1977).**

Of course, in undertaking this determination, the trial court necessarily uses as guideposts the criteria for ultimate approval of the settlements. With respect to that issue the Fifth Circuit has stated that "[p]articularly in class action suits, there is an overriding public inter-

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* This determination is committed to the sound discretion of the trial court. *See City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 454 (2d Cir. 1974).

** It is clear that the determination should not include a decision on the merits. *Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157, 1169 (5th Cir. 1978); *Young* v. *Katz*, 447 F.2d 431, 433 (5th Cir. 1971); *Florida Trailer Equipment Co.* v. *Deal*, 284 F.2d 567, 571 (5th Cir. 1960).

est in favor of settlement." *Cotton* v. *Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977). Consequently, the trial court need merely insure "that (1) there is no fraud or collusion in arriving at the settlement and (2) the settlement is fair, adequate and reasonable . . ." *Miller* v. *Republic Nat'l Life Ins. Co.*, 559 F.2d 426, 428-29 (5th Cir. 1977).

Here, the settlements are reasonable on their face. They were executed after good faith, arms-length negotiations. And the nearly $300,000,000 in settlements is unquestionably fair, adequate and reasonable in the circumstances of this case. The settlements are therefore well within the range of possible approval and should be conditionally approved for the purpose of notice to the class.

I.

The Settlements Are A Product Of Good Faith, Arms-Length Negotiations

The nature of the settlement negotiations is pertinent to the decision whether to approve a class action settlement *, for "the trial court is entitled to rely upon the judgment of experienced counsel for the parties." *Cotton* v. *Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977); *accord*, *Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157, 1215, 1216 (5th Cir. 1978). As the *Cotton* court held, "the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel." *Id.* This is particularly true in

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* *See In re General Motors Corp. Engine Interchange Litigation*, No. 78-2036 (7th Cir., Feb. 26, 1979); *Patterson* v. *Stovall*, 528 F.2d 108, 114 (7th Cir. 1976). The settlement in the *GM Interchange Litigation* was negotiated in apparent contravention of trial court orders governing the same. As we shall see, that case has no bearing on the settlement at issue here.

complex antitrust litigation. *See In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 410 F. Supp. 659, 664 (D. Minn. 1974). *See also In Re Anthracite Coal Antitrust Litigation*, 79 F.R.D. 707, 712 (M.D. Pa. 1978); *West Virginia* v. *Chas. Pfizer & Co.*, 440 F.2d 1079, 1085 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971). Of course, there is not the slightest hint of fraud or collusion in the negotiation of these settlements. The negotiations were conducted in utmost good faith and at arms' length.

A. *The Negotiations Were Conducted In Accordance With Pretrial Order No. 2 With The Express Approval Of The Court.*

The St. Regis and International Paper settlements were concluded prior to class certification. Nevertheless, Pretrial Order No. 2 expressly authorized the Steering Committee to negotiate settlements on behalf of the class. And that class is of course now certified. In any event, in the instance of both settlements, plaintiffs' counsel obtained the express approval of the Court before conducting settlement negotiations.

The round of remaining settlements begun before Christmas of 1978 reflected the expressed desire of the Court that the parties attempt to achieve some compromise of the litigation. The Court was informed of the status of the first such settlement negotiation—that with Union Camp—as soon as it was concluded. The following avalanche of settlements was once again conducted under the supervision of the Steering Committee in accordance with Pretrial Order No. 2.

The settlement negotiations were, therefore, as open and above board as was possible in the circumstances. Likewise, they were conducted in full compliance with this Court's orders. There can be no question that they were undertaken in the best of faith.

B. *The Negotiations of All Parties Were Vigorous and Adversarial.*

The two settlements negotiated prior to class certification reflect just as much arms-length bargaining as do those negotiated after the Fifth Circuit denied defendants' petition for writ of mandamus on the certification issue. Prior to certification, it was vitally important for plaintiffs to obtain some substantial settlement for the class regardless of certification * and to obtain extensive cooperation in the pursuit of the class litigation. This plaintiffs were able to achieve at a time when most defendants had shown no interest in settlement whatsoever. The contingency of class certification at this stage cannot be overlooked. Most defendants did not discuss settlement seriously until the Fifth Circuit denied their mandamus petition.

After certification, the substantial threat to settlement at reasonable amounts became the possibility that defendants would form unbreakable coalitions. The settlements with Union Camp, Boise-Cascade and Champion went a long way toward effectively forestalling such a threat. And plaintiffs made up for these earlier discounted settlements by escalating their demands from later settlers.

Likewise, the terms of the settlement agreements became progressively more onerous. In the end, defendants

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* With respect to the St. Regis settlement, and all subsequent settlements with unindicted defendants, it should be remembered that until the *Corrugated* case, unindicted corporations had not customarily been named as civil defendants in national class action litigation, so that *any* recovery with an unindicted defendant in this case must be considered a significant improvement over prior antitrust class action settlements. Of course, the "unindicted" settlements, totalling $53,268,870, have been far from insubstantial here.

met substantially all of plaintiffs' conditions. Throughout the negotiations, there was not the slightest possibility that fraud or collusion was involved.

Finally, all plaintiff's counsel approved the St. Regis and IP settlements. There has been some dissent to the subsequent settlements,* but the overwhelming majority of plaintiffs' counsel support all of the settlements. On their judgment, which this Court should not lightly ignore, *see Cotton* v. *Hinton*, *supra*, all the proposed settlements should be approved.

II.

The Settlements Are Fair, Adequate And Reasonable

In making a final assessment of the reasonableness of a class action settlement, "the judge should form an educated estimate of the complexity, expense and likely duration of [the] . . . litigation, the possible difficulties of collecting on any judgment which might be obtained,**

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* As counsel to designated class representatives, James Sloan and Granville Specks expressed opposition to the post-certification pre-January 5th settlements initially on the ground that in spite of the fact that Mr. Montague, counsel to a sheet plant, supported them, it was improper for the class representatives to negotiate on behalf of both container purchasers and sheet purchasers without first agreeing on how any settlement amounts would be allocated between the two types of purchasers. They subsequently took the position that these settlements were inadequate or that they lacked sufficient information to determine whether they were adequate. More recently, they have stated that they have not decided whether they will oppose these settlements.

** Plaintiffs do not rely on this particular factor in support of the settlements. Plaintiffs do not dispute the fact that the Settling Defendants as a whole are probably solvent enough to pay the settlements several times over.

and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise." *Protective Committee* v. *Anderson*, 390 U.S. 414, 424 (1968), *quoted with approval in Miller* v. *Republic Nat'l Life Ins. Co.*, 559 F.2d 426, 429 (5th Cir. 1977). The Fifth Circuit in *Miller* also held "that the likelihood of success if litigated and the probable rewards of that litigation should be weighed in the decision." 559 F.2d at 429. This latter consideration is the most important. *See Cotton* v. *Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977); *In re Anthracite Coal Antitrust Litigation*, 79 F.R.D. 707, 712 (M.D. Pa. 1978). Given the contingencies inevitably present in any case of this type and complexity, the fairness of these settlements should be apparent.

A. *The Partial Settlements Do Not Reduce Significantly the Prospects of Full Single Damage Recovery for the Class*

Plaintiffs' experts estimate that the overcharges by Settling Defendants to the class are in the range of $185.8 million to $789.0 million. *See* Exhibit B, *infra*. In the case of final approval of a full settlement, a court would typically compare the settlement fund with this amount or range in order to evaluate the adequacy of the settlement. *See West Virginia* v. *Chas. Pfizer & Co.*, 440 F.2d 1079, 1084 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971); *In re Anthracite Coal Antitrust Litigation*, 79, F.R.D. 707, 714 (M.D. Pa. 1978). This is not the typical case. Here there is merely a partial settlement. Moreover, in each and every settlement agreement, the Settling Defendant has agreed to leave its sales in the lawsuit, thus making Non-Settling Defendants potentially liable for the full damage of the conspiracy. Consequently, it is the amount of the settlements plus the amount of judgment that Non-Settling Defendants would be able to pay which must be compared to the potential recovery in the case. As is demon-

strated in Exhibit C to this brief, the Non-Settling Defendants could pay a large enough judgment at least to cover the plaintiff class' single damages, even under the most optimistic measure of damages by plaintiffs' experts.

Even if the partial settlements were all the settlement fund to be received for the entire case, it would still be evident that the settlements fall within the range of possible approval. For example, in the *Anthracite Coal* case, the court approved a settlement equal to 28% of plaintiffs' projected single damages. 79 F.R.D. at 714. Even more telling are the partial settlements that were approved in the *Plywood* litigation. *In re Plywood Antitrust Litigation.* M.D.L. No. 159 (E.D. La., March 24, 1978). These partial settlements totaled approximately $58 million. Yet in finding that the non-settling *Plywood* defendants were liable for conspiring to fix plywood prices, the Louisiana jury established a measure of actual damages in the range of one billion dollars. These two cases demonstrate that antitrust class action litigation is risky business and that substantial settlements are not lightly disapproved.

Here, the partial settlements obtained to date represent a healthy percentage of plaintiffs' experts' highest estimate of the overcharge by Settling Defendants to the class. They are clearly within the range of possible approval.

B. *The Contingencies of Obtaining Full Recovery for the Class are Significant*

The plaintiffs would have run four risks in continuing to litigate against the Settling Defendants. First, there is the risk that plaintiffs might not ultimately be successful in proving their case. Second, they run the related risk that the class might be decertified in the course of continued litigation. Third, they run the risk of substantial opt-outs. Finally, there is the risk that legisla-

tion will be passed overruling the Supreme Court decisions in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), and *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

1. *Proof of the Class Case is not Certain*

The criminal trial has materially assisted the civil plaintiffs' nationwide price-fixing case, but contingencies remain. Testimony has largely pertained to price communications in three distinct geographic areas: New York City/New Jersey; Michigan; and Memphis/Little Rock. The Government has made no attempt to show that the conspiracy extended west of the Rockies. In addition, the Government has been fairly true to its word in its trial brief; it has made no effort to conclusively establish impact.

Plaintiffs, therefore, would have run some risk in establishing class-wide liability and impact as against Settling Defendants. Likewise, the evidence of damages is not airtight. Hence, it is not irrefutably demonstrable that class plaintiffs would have been able to establish their case in a civil trial against Settling Defendants. While plaintiffs remain confident of the viability of their case, it must be acknowledged that there would have been not inconsequential risks involved in going to trial against the Settling Defendants.

2. *Decertification Remains a Small But Perhaps Significant Risk*

Evidence of a class-wide conspiracy has emerged in the criminal trial, but little evidence of impact, has been presented. Of course, the criminal trial presentation bears no relationship to the one that would have been contemplated in a civil case against the Settling Defendants. Nevertheless, it is significant that the criminal trial does

not conclusively support plaintiffs' arguments on the class certification issue.

Of course, Settling Defendants would have been able to argue to the Fifth Circuit on appeal that the class should not have been certified. The risk of decertification, while quite small, was nevertheless present. And it is a risk that would have effectively foreclosed any relief against Settling Defendants for many class members.

3. *There May Be Risk of Substantial Opt-Outs*

As in any class action case, if any class members opt-out, the universe of potential damages is reduced. With a class of direct purchasers, there is a greater than usual risk that there will in fact be a substantial number of class members who will choose to opt-out rather than sue their supplier.

4. *Illinois Brick Legislation Threatens the Class Recovery*

In *Hanover Shoe*, the Supreme Court ruled that there was no "passing on" defense to a claim of price-fixing. In *Illinois Brick*, the Court ruled that, because of *Hanover Shoe*, indirect purchasers have no antitrust cause of action for price-fixing. The *Illinois Brick* decision has spawned a flurry of legislative activity designed to provide indirect purchasers with such a cause of action. Most of the proposed legislation* contains two critical features. First, the new bills would overrule *Hanover Shoe* as well as *Illinois Brick*. Second, the proposals would be retroactive in effect, so as to resurrect any pending indirect purchaser claims. If such legislation were passed, Settling Defendants—had they not settled—would have been provided with a defense as to direct

* See e.g. Antitrust Enforcement Act of 1978, S. 1874, H.R. 1942, 95th Cong. 2d Sess. (1978).

purchasers that could conceivably have foreclosed virtually all damage recovery by plaintiffs.

5. *Litigation Against Settling Defendants Would Have Been Protracted and Costly*

The Unified and Consolidated Complaint alleges a price-fixing conspiracy that is mammoth in scope, permeating a vast industry for at least eighteen years. As the evidence has unfolded in the criminal trial, it has become clear that there were a multitude of conspirators. Proving the existence and effect of this entire conspiracy will be a significant undertaking. Even as reduced in scope to take the settlements into account, the litigation will be lengthy and expensive. Absent the settlements, it might have reached unwieldy logistic and financial proportions.*

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* While plaintiffs firmly believe that the contribution issue raised by Westvaco is without merit—especially in the context of partial good faith settlements—all parties recognize that a general rule of contribution in antitrust cases would totally stymie settlement possibilities. Apart from its merits, the issue of contribution has been given renewed life by the post-settlement decision of the Eighth Circuit in *Professional Beauty Supply, Inc.* v. *National Beauty Supply*, 1979-1 Trade Cas. § 62,485 (8th Cir., Feb. 27, 1979), and until that issue is resolved (perhaps conclusively on appeal), it is unlikely that any defendant would be as willing as were the settling defendants to assume the risk of a change-of-law and to pay a substantial amount to individually settle with plaintiffs. Certainly, any defendant willing to assume that risk would be more insistent, than were settling defendants, that its sales be eliminated from this case. All this means that disapproval of these settlements would either condemn the parties to lengthy litigation to judgment or require plaintiffs to settle with all defendants on a group basis that the history of this very case has indicated would produce a result much less favorable to the class.

6. *Conclusion*

Litigation against the Settling Defendants would have been a very costly and drawn out process, with no iron-clad guarantee of any recovery whatsoever for the class. Given the contingencies and expense of litigation, the substantial settlements reached with Settling Defendants are more than reasonable and adequate.

C. *The Settlement Agreements Remove the Risk of Reduced Recovery and the Prospect of Protracted Litigation Against Settling Defendants*

The effect of all compromise is to remove the risks of litigation and to save the parties the expense of going to trial. The Settlement Agreements entered into with Settling Defendants do even more. They also remove the risk of decertification, deal effectively with opt-outs, overcome the threat of *Illinois Brick* legislation, greatly reduce the expense of litigating against Settling Defendants and help reduce the expense of litigating against the Non-Settling Defendants.

1. *The Settlements Stand Even in the Event of Decertification*

Each of the settlement agreements stipulates a class to receive the settlement at issue. Although Settling Defendants argued against it, each of the agreements has a paragraph providing that the settlement takes effect regardless of the continued certification of that class (or subclass). The agreements, therefore, wholly remove the risk of decertification.

2. *The Settlements Contain Opt-Out Provisions That Favor the Settlement Classes*

The settlements approved in *West Virginia* v. *Chas. Pfizer & Co.*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404

U.S. 871 (1971), provided that the settlement would be reduced in proportion to the number of opt-outs. *Id.* at 1082. The post-certification agreements executed here contain "opt-out" provisions that are far more favorable to the class, for they merely give the Settling Defendant the right to repudiate the settlement if a certain percentage of purchasers request exclusion and actually file suit. In no event is the settlement amount to be reduced.* The risk of substantial opt-outs is therefore largely averted.

3. *The Settlements For the Most Part Provide Settling Defendants With No Illinois Brick Protection*

In the *Anthracite Coal* litigation, the settlement agreements, executed in May and July of 1978, and approved in September of 1978, set aside a portion of the settlement for allocation to an indirect purchaser class should Congress have overruled *Illinois Brick* prior to January 1, 1979. *In re Anthracite Coal Antitrust Litigation*, 79 F.R.D. 707, 710 (M.D. Pa. 1978). The first three settlements in this case had similar provisions; two of these provisions have now expired. None of the remaining agreements gave any such protection to Settling Defendant. In effect, the corrugated class now stands in a better position then did the *Anthracite* class on the date of approval. The risk of *Illinois Brick* legislation has been completely avoided.

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* That their settlement agreements will stand in the face of substantial opt-outs also benefits plaintiffs because the opt-outs will reduce the amount of claims against the settlement funds, thereby making available a greater recovery to the remaining members of the class.

4. *The Cooperation Provisions in the Settlement Agreements Should Reduce the Cost of Litigating Against Non-Settling Defendants*

The Settlement Agreements contain extensive cooperation agreements whereby each Settling Defendant has agreed to assist the class plaintiffs in pursuing the litigation against the Non-Settling Defendants. To the extent that these cooperation provisions are made effective, the class plaintiffs should be able to save their time and the class' expense in the remaining litigation.

The value of the extensive cooperation agreement has already been shown. Because of these provisions, plaintiffs' counsel were able to arrange conferences between plaintiffs' expert economist, Dr. Richard Hoyt, and the chief economists for International Paper Co. and St. Regis. These conferences occurred in New York on March 8 and 9, 1979. They were followed by a telephone conference between Dr. Hoyt and the IP economist on April 11, and between Hoyt and the St. Regis economist on April 12. These conferences were valuable in providing plaintiffs with background economic and other information respecting the corrugated container industry, and in refining the assumptions being employed in plaintiffs' damages estimates. The cooperation clauses have also offered plaintiffs the opportunity for an on-site tour of St. Regis' corporate headquarters in Pittsburgh, Pennsylvania, occurring on April 3, 1979, and IP's corporate headquarters in New York City, occurring on April 11, 1979, for the purpose of learning the nature and amount of economic and other documentation such a headquarters should contain. The resultant refinement of plaintiffs' discovery against the Non-Settling Defendants will save thousands of dollars in fees and expenses to the class members. Further evidence of the importance of the Settling Defendants' cooperation agreements is the fact that the agreements with IP and St. Regis

have recently been amended to carve out $400,000.00 of the amounts paid in settlement for the purpose of meeting the expenses incurred by plaintiffs in preparing a list of class members and mailing class notice.

D. *When Liability Has Not Been Established, Single Damages For The Four-Year Limitation Period Have Been Considered An Appropriate Method For Evaluation Of Proposed Settlements*

In *City of Detroit* v. *Grinnell Corp.* 484 F.2d 448, 458-59 (2nd Cir. 1974), the Court stated the reasons for using single damages as a measure against which to evaluate settlements:

> While it is true that treble damages are extracted from a Defendant who untimately loses a civil antitrust suit on the merits, there are strong reasons why trebling is improper when computing a base recovery figure which will be used to measure the adequacy of a settlement offer. First, the vast majority of Courts which have approved settlements in this type of case, even though they may not have explicitly addressed the issue, have given their approval of settlements which are traditionally based on an estimate of single damages only. . . Second, to argue that treble damages ought to be considered in a calculation of a base recovery range is to distort the entire theoretical foundation which underlies the settlement process. It requires Defendants to admit their guilt for the purpose of settlement negotiations. One of the underlying premises on which such negotiations are based, however, is that Defendants never have to concede their guilt. They can protect their innocence of any wrongdoing and assert that they are settling for purely pragmatic business reasons. To require treble damages to be considered as part of the computation of the base

> liability figure would force defendant automatically to concede guilt at the outset of negotiations. Such a concession would upset the delicate settlement balance by giving too great an advantage to the claimants—an advantage that is not required by the antitrust laws and one which might well hinder the highly favored practice of settlement.

The cases also establish that the four-year statute of limitations period is the appropriate basis for calculating the single damages measure. In the *City of Detroit* case in the district court, 356 F.Supp. 1380, 1386 (S.D.N.Y. 1972), Judge Metzner stated:

> [I]n most of the settlements approved in other class action antitrust cases, the period has been 4 years which is the statute of limitations for such actions...

III

Plaintiffs' Proposed Plan of Allocation and Distribution

A. *Pre-January 5th Settlements*

The pre-January 5th settlements were negotiated on behalf of all purchasers of corrugated containers or sheets from any defendant or any subsidiary or affiliate of any defendant at any time from January 1, 1960 to January 25, 1978. Plaintiffs therefore believe it appropriate for the Court to approve for the pre-January 5th settlement the following Plan of Allocation and Distribution, which will reimburse members of both the container purchaser and sheet plant sub-classes who purchased corrugated containers or corrugated sheets from defendants between January 1, 1960 to January 25, 1978, inclusive, for allowed purchases on a pro rata basis after deduction for fees and expenses under the proposed plan:

(a) All settlement funds created by pre-January 5th settlements will be added together to create a single fund ("Classwide Fund");

(b) All class members desiring to participate in the Classwide Fund will submit their claims on the basis of dollars of corrugated containers and sheets purchased from any of the defendants, including subsidiaries and affiliates, during the period January 1, 1960 through January 25, 1978, on the claim form appended to the Proposed Form of Notice, filed herewith;

(c) The claim forms will be checked and, where appropriate, will be audited by a committee of plaintiffs' counsel and an independent firm of certified public accountants;

(d) The allowed claims of all class members will be totalled; and

(e) Each claimant will receive a pro rata share of the Classwide Fund (after deduction of attorneys' fees and costs) based upon its allowed claim as they relate to the allowed claims of all class members.*

B. *Post-January 5th Settlements*

These settlements were negotiated on behalf of the container purchaser sub-class only. While these settlements provide that the Court, upon application of the sheet plant sub-class, may allocate a portion of these settlements (not to exceed $14,896,245) to the sheet plant sub-class, no such application has been made nor have

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* This Plan of Allocation and Distribution has, after arms-length negotiation, been agreed to by the undersigned representatives of both the container purchaser sub-class and the sheet plant sub-class.

the representatives of the container purchaser sub-class determined what response, if any, they would make to such application. Accordingly, the representatives of the container purchaser sub-class propose the following Plan of Distribution as to the post-January 5th settlements:

(a) All settlement funds created by the post-January 5th settlements will be added together to create a single fund ("Container Purchaser Sub-class Fund");

(b) The members of the container purchaser sub-class desiring to participate in the Container Purchaser Sub-class Fund will submit their claims on the basis of dollars of corrugated containers and sheets purchased from any of the defendants, including subsidiaries and affiliates, during the period January 1, 1960 through January 25, 1978, on the claim form appended to the Proposed Form of Notice, filed herewith;

(c) The claim forms will be checked and, where appropriate, will be audited by a committee of plaintiffs' counsel and an independent firm of certified public accountants;

(d) The allowed claims of all members of the container purchaser sub-class will be totalled; and

(e) Each claimant who is a member of the container purchaser sub-class will receive a pro rata share of the Container Purchaser Fund (after deduction of the portion of said Fund, if any, that the Court allocates to the sheet plant sub-class and attorneys' fees and costs) based upon its allowed claims as they relate to the allowed claims of all members of the container purchaser sub-class.

IV

Fees And Expenses

The Steering Committee is responsible for assigning work in this litigation and monitoring the time spent by attorneys in performing such work. In accordance with the Court's repeated instructions to eliminate duplicative and unnecessary work and thus minimize the expense of the litigation to the class, the Steering Committee has required that all class attorneys turn in to the plaintiffs' Attorneys Time and Disbursement Committee a monthly breakdown of time and expenses. This report is to describe in detail the time spent by lawyers and legal assistants on various aspects of this case and to itemize all expenses incurred on behalf of the class. To enforce this reporting requirement, the Steering Committee has refused to assign work to those attorneys who are delinquent in turning in their time and expense reports. In addition, it has assured all attorneys that the Steering Committee, in connection with any fee application, will notify the Court that it is unable to vouch for the reasonableness and necessity of any attorney and legal assistant hours spent during any months for which the Attorneys Time and Disbursement Committee received no time and expense report within the hundred-day period following the expiration of that month.

As of April 1, 1979, twelve attorneys, out of the forty-nine attorneys required to report time, were delinquent in their time and expense reports to the Attorneys Time and Disbursement Committee. Nevertheless, including the time of these delinquent attorneys to the extent that they have reported time and disbursements, as of April 1, 1979, twenty-six thousand two hundred twenty (26,220) hours of attorneys' time and six thousand seven hundred fifteen (6,715) hours of legal assistants' time has been reported as having been expended on this case.

Obviously, some of the attorney time reported was expended by senior attorneys and some by junior attorneys, some on complex tasks and some on routine tasks. Without attempting at this time to analyze the number of hours reported, it should suffice for present purposes to point out that if the Court were to compensate all attorneys for each and every hour reported in this case at an average rate of $300 per hour and each legal assistant at a rate of $35 per hour, the total fee award to date would amount to $8,100,990.00.

The expenses of this litigation have been handled in two ways. First, each attorney who plans to file a fee application has been asked to pay routine assessments to the Plaintiffs' Corrugated Committee to cover reproduction costs, document depository costs, expert fees, liaison counsel expenses, etc. Furthermore, as to those expenses which are not paid centrally but rather disbursed by each attorney for items such as his own travel expenses—telephone expenses, reproduction expenses, etc. —each attorney has been required to report these on a monthly basis to the Attorneys' Time and Disbursement Committee. As of April 1, 1979, the expenses disbursed by the Plaintiffs' Corrugated Committee on behalf of all plaintiffs amounted to $201,871.40, and the expenses individually advanced by each attorney (excluding the payment of common assessments) totaled $281,853.85, or a total expenditure to date of $483,725.25.

In view of the above, the Steering Committee estimates that as of April 1st, the maximum fees and expenses incurred to that time and payable out of the settlements should not exceed $9,000,000.00, or three percent (3%) of the principal of the settlement funds. As pointed out above, the amount of interest earned on these funds *to date* more than adequately covers the attorneys' fees and expenses incurred since the inception

of these cases. While plaintiffs anticipate that their attorneys will continue to expend time and incur expenses in connection with the post-April 1st prosecution of this case against the non-settling defendants, it is inconceivable that these fees and expenses would at any time exceed the interest currently being earned on the settlement funds. As a result, plaintiffs are confident that no antitrust class action recovery in history has been obtained for as small a percentage of fees and expenses as has been required in this case.

CONCLUSION

The function of the Court in preliminarily passing upon the reasonableness of a class action settlement is to assure that the class representatives who have negotiated the same have adequately and vigorously championed the rights of the class and to assure that the ultimate recovery to the class will not be unnecessarily diminished by the expense of notifying the class of a settlement that is woefully inadequate and that the Court, upon objection by any class member, would probably not approve. The Court is not to conduct a mini-trial nor to substitute its judgment for that of plaintiffs' counsel. It is simply to determine whether, under all the circumstances, plaintiffs' counsel made a good faith effort to exercise their judgment in the best interest of the class. Obviously, that judgment had to be exercised at a particular point in time in light of the information that plaintiffs' counsel reasonably have had available to them at that point in time. Any trial lawyer worth his salt knows that hindsight is better than foresight and that litigation is a living organism that rarely remains static and always requires a readjustment of one's views of the merits of the case. For that reason, in the non-

class action context, trial lawyers are reluctant to evaluate their settlement decisions in terms of hindsight lest they be immobilized from grasping reasonable settlement opportunities for fear of leaving money on the table. While Rule 23 arguable requires courts to evaluate class settlements in light of the circumstances existing at the time they are presented for approval, the courts should be reluctant, in conducting such postmortem evaluations, to hold class counsel to too high a standard of clairvoyance, for to do so would discourage all settlements of class actions until the eve of trial.

Obviously, there is no suggestion here that plaintiffs' counsel exercised anything other than their best judgment as to when and how to maximize recovery for the class. There is no hint of collusion with settling defendants or failure to consider carefully all the evidence that was then available, including the preliminary estimates of plaintiffs' experts based thereon. While those estimates have now been revised and refined (based primarily on information that has been furnished by the settling defendants and that was not available when the individual settlements were negotiated), the settlements are well within the range of the experts' current estimates. In assessing the reasonableness of such estimates, the Court should keep in mind the great leeway and flexibility accorded plaintiffs in providing the amount of damages in an antitrust trial. The Fifth Circuit has frequently emphasized that "proof of losses which border on the speculative must be resorted to in order to implement the policy of the antitrust laws," *Hobart Bros. Co.* v. *Malcolm T. Gilliland, Inc.*, 471 F.2d 894, 903 (5th Cir.), *cert. denied*, 412 U.S. 923 (1973), and that plaintiff's "expert on damages need not be armed on the right hand with slide rule, and on the left with a com-

puter. He is allowed some economic imagination so long as it does not become fantasy," *Terrell* v. *Household Goods Carriers' Bureau*, 494 F.2d 16, 25 (5th Cir. 1974) (*en banc*). And if those are the standards to be applied to determining damages *at trial*, then certainly a more exacting standard cannot be expected of plaintiffs' economists in estimating damages, prior to normal merit discovery, for the purpose of evaluating class settlements.

The ultimate issue before the Court at this time is whether the Court is convinced that the disapproval of these settlements will likely result in a greater recovery, either through settlement or trial, for the class members. And the Court must make that decision, not only in light of various estimates of potential damages, but also in light of all that has transpired since many of the settlements were negotiated: the creation of a sheet plant subclass, the introduction of *Illinois Brick* legislation, the evidence in the criminal trial, and the renewed vigor with which one of the non-settling defendants has sought to assert a claim for contribution against the settling defendants. And even were the Court firmly convinced that the atmospheric conditions that existed in December and January will again be ripe to produce a desire on the part of defendants to settle this litigation, the Court must also consider the expense to the class of continuing to vigorously prosecute this action against all defendants until such time as those magic moments reoccur. Will the Court be able to say then, as it can with confidence now, that the history of this litigation unequivocally demonstrates that there are class actions that benefit the class members considerably more than their attorneys?

For the foregoing reasons, the undersigned plaintiffs respectfully request that all settlements presently before

the Court be preliminarily approved and that the class be given notice of the same.

Respectfully submitted,

Of Counsel:

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Chairman, Plaintiffs'
Settlement Justification
Committee
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University of Texas
School of Law
Austin, Texas (on leave)

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BY /s/ *Stephen D. Susman*
STEPHEN D. SUSMAN
On Behalf of All Plaintiffs
Supporting Settlements

[Certificate of Service omitted]

EXHIBIT A
SETTLEMENTS-TO-DATE IN ORDER OF NEGOTIATION

Defendant	1972-76 % of Defts Mkt*	$1 Million per point	Settlement (in millions)	For	Maximum Possible Allocation Sheet Plant SubClass (in millions)	Date Exec. **	Payment	Other Terms
1. St. Regis	3.97	.428	1.7	All		7/21/78	Cash	Ill. Brick protection (now expired); walk-away on opt-outs.
2. I. P.	8.3	1.0	8.3	All		8/24/78	Cash	Ill. Brick protection (now expired); walk-away on opt-outs; waiver of privileges.
3. Union Camp	3.7	2.0	7.4	All		12/20/78	Cash	Ltd. *Ill-Brick*; Ltd. opt-out; stipulated class.
4. Diamond	.5	2.0	1.0	All		12/22/78	Cash	No *Brick*; no opt-out; stipulated class; waiver of privileges.
5. Dura	.375	2.0	.750	All		1/ 3/79	Letter of credit due 9/3/79 at 11%	No *Brick*; no opt-out; stipulated class.
6. Chesapeake	1.26	2.4	3.024	All		12/28/78	Cash	No *Brick*; Ltd. opt-out; stipulated class.
7. Longview	2.58	2.5	6.45	All		12/21/78	Cash on 2/15	No *Brick*; Ltd. opt-out; stipulated class.
8. Boise-Cascade	2.826	3.5	9.891	All		12/27/78	Cash	No *Brick*; Ltd. opt-out; stipulated class.
9. Willamette	4.18	2.7	11.286	All		12/28/78	Cash	No *Brick*; Ltd. opt-out; stipulated class.
10. Champion	5.36	4.5	24.120	All		12/27/78	Cash	No *Brick*; Ltd. opt-out; stipulated class.
11. Menasha	1.67	2.75	4.592250	All		1/15/79	Cash on 2/15	No *Brick*; Ltd. opt-out; stipulated class.
12. CCA	8.56	4.0	34.240	CPSC	1.3696	1/25/79	Cash	No *Brick*; Ltd. opt-out; stipulated class.
13. Weyerhaeuser	7.83	5.0	39.150	CPSC	2.54475	1/23/79	Cash on 1/25	No *Brick*; Ltd. opt-out; stipulated class.

EXHIBIT A—Continued

SETTLEMENTS-TO-DATE IN ORDER OF NEGOTIATION

Defendant	1972-76 % of Defts Mkt*	$1 Million per point	Settlement (in millions)	For	Maximum Possible Allocation Sheet Plant SubClass (in millions)	Date Exec. **	Payment	Other Terms
14. McMillan-Bloedel	2.11	4.0	8.44	CPSC	.838986	2/28/79	Cash	No *Brick*; Ltd. opt-out; stipulated class.
15. Owens-Ill.	5.45	6.0	32.7	CPSC	2.289	1/26/79	Cash	No *Brick*; Ltd. opt-out; stipulated class.
16. Olinkraft	1.225	6.0	7.35	CPSC	.393093	1/19/79	Cash	No *Brick*; Ltd. opt-out; stipulated class.
17. Continental Group	4.22	6.5	27.43	CPSC	1.89267	3/ 8/79	Cash	No *Brick*; Ltd. opt-out; stipulated class.
18. Inland	7.29	4.75	34.6275	CPSC	2.07765	2/16/79	Cash	No *Brick*; Ltd. opt-out; stipulated class.
19. Stone	3.055	4.75	14.511250	CPSC	1.39308	2/12/79	Cash on 3/1	No *Brick*; Ltd. opt-out; stipulated class. Conditioned on obtaining waivers from Secured Creditors.
20. St. Joe	2.625	4.75	12.46875	CPSC	1.0349	2/20/79	Cash on 3/1	No *Brick*; Ltd. opt-out; stipulated class.
21. U. S. Corrugated	.76728	4.0	3.06912	CPSC	.334534	3/23/79	1.53456 on 3/1; .383640 on 5/7, 8/24, 11/1, and 1/2/80	No *Brick*; Ltd. opt-out; stipulated class.
22. Green Bay	1.71	3.25	5.5575	CPSC	.728032	3/14/79	Promissory note due on 3/1/81, or final approval with interest quarterly at escrow rate.	No *Brick*; Ltd. opt-out; stipulated class.
TOTAL	79.56328		298.05737		14.896245			

* Assuming defendants account for 72% of the total market.

** Frequently, the agreements were executed some time after they were negotiated and orally agreed to by counsel.

TABLE 2

ESTIMATED OVERCHARGES UNDER ALTERNATIVE ASSUMPTIONS OF SALES AND NET PROFITS

Model Number	Model Type	Sales ($000)	Damage Period (Months)	Average Net Profits (% Sales)		Estimated Overcharges ($000)
1	During & After	$11,759,100	48	1973-76	7.55	
				1977-78	.84	
				Differ.	6.71%	$789,036
2	During & After	$10,907,586	45	1973-76	7.55	
				1977-78	.84	
				Differ.	6.71%	$731,899
3	During & After	$10,907,586	45	1972-76	6.28	
				1977-78	.84	
				Differ.	5.44%	$593,372
4	During & After	$ 7,581,778	33	1973-75	8.81	
				1976-78	1.81	
				Differ.	7.00%	$530,724
5	During & After	$ 7,581,778	33	1970-75	6.91	
				1976-78	1.81	
				Differ.	5.10%	$386,670
6	During & After	$11,759,100	48	1972-75	4.26	
				1976-78	1.81	
				Differ.	2.45%	$288,097
7	During & After	$ 7,581,778	33	1971-75	5.07	
				1976-78	1.81	
				Differ.	3.26%	$247,165
8	During & After	$ 7,581,778	33	1970-75	4.26	
				1976-78	1.81	
				Differ.	2.45%	$185,753

APPENDIX A

PERSONAL DATA SUMMARY

RICHARD C. HOYT

Date of Birth: September 30, 1939

Place of Birth: St. Paul, Minnesota

Armed Service Record: Commissioned 2nd Lt. in the U.S. Army Corps of Engineers February 1962; honorably discharged February 1965.

Education:

Secondary School: Shattuck School
Faribault, Minnesota
Years attended: 1954 to 1957

College: Kansas State University
Manhattan, Kansas
Years attended: 1957 to 1962
Degree: Bachelor of Science in Milling Technology; received in February 1962.

University of Minnesota
St. Paul, Minnesota
Years attended: 1966 to 1972
Degree: Master of Science in Economics; received in June 1968
Degree: Ph.D. in Applied Economics; received in June 1972
Thesis: A Dynamic Econometric Model of the Milling and Baking Industry.

Professional Experience:

Position:	Milling Engineer Tennant and Hoyt Company Lake City, Minnesota 55041 Date: June 1965 to August 1966
Position:	Research Assistant Department of Agricultural and Applied Economics University of Minnesota St. Paul, Minnesota 55101 Date: March 1967 to March 1971
Position:	President Tennant and Hoyt Company Lake City, Minnesota 55041 Date: April 1971 to August 1972
Position:	President Analytics, Incorporated 464 Second Street Excelsior, Minnesota 55331 Date: September 1972 to present
Position:	Instructor William Mitchell College of Law St. Paul, Minnesota 55105 Date: 1977-78
Position:	MBA Faculty College of St. Thomas St. Paul, Minnesota 55105 Date: 1978-79

Membership in Professional and Honorary Organizations:

American Agricultural Economics Association
Gamma Sigma Delta
American Economic Association
Operations Research Society of America
The Institute of Management Science

Publications:

John H. Sanders and Richard C. Hoyt, "The World Food Problem; Four Recent Empirical Studies," *American Journal of Agricultural Economics*, Volume 52, Number 1, February 1970.

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Decker v. *Safeway Stores, Inc.*, No. 248 (N.D. Tex.)

Carlson Companies, Inc. v. *Sperry and Hutchinson Co.*, No. 4-72 Civ. 327 (D. Minn., filed 1972)

Hoyt Construction Co., Inc. v. *Alside, Inc.*, No. 4-75 Civ. 257 (D. Minn., filed 1975)

Anderson v. *Alside, Inc.*, No. 3-76 Civ. 173 (D. Minn., filed 1976)

Meat Price Investigation Assn. v. *Safeway Stores, Inc.*, No. 75-333-2 (S.D. Ia., filed 1975)

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Forrester v. *Burlington Northern Railroad*, No. 699603 (Minn. 4th Jud. Dist.)

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Parson v. *United States of America,* No. F-66-32 Civ. (E.D. Cal.)

Sanford v. *Lineberg,* No. 723357 (Minn. 4th Jud. Dist.)

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Eldridge v. *Inland Steel Co.,* No. 7462851 (D. Ill.)

Chase v. *Home Insurance Co.,* (D. N.D.)

In Re Corrugated Container, No. M.D.L. 310 (S.D. Tex.)

United States of America v. *Armco Steel Corporation,* 73-H-336 (S.D. Tex., Houston Div.)

Samuel J. Tripp v. *Gulf Oil Corporation,* 4-78-Civ. 326 (D. Minn.)

Ignacio Cantu v. *Owatonna Canning Co.*, 3-76 Civ. 374 (D. Minn.)

In Re Folding Cartons, M.D.L. 250 (N. Ill.)

Harold & Margot Siegel v. *Empire Savings Bank*, (Minn. 4th Jud. Dist.)

William E. Forbush v. *Burlington Northern, Inc.*, Civ. 4-78-461 (D. Minn.)

EXHIBIT B

IN THE DISTRICT COURT OF
THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. No. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

AFFIDAVIT OF RICHARD C. HOYT

I, RICHARD C. HOYT, being first duly sworn, depose and say:

I am President of Analytics, Inc., an economic consulting firm located at 464 Second Street, Excelsior, Minnesota.

I received a Ph.D. in Agriculture and Applied Economics from the University of Minnesota in June, 1972.

I have written and published several articles on economics, and have been employed as an expert consultant by both plaintiffs and defendants in connection with numerous lawsuits. I have been qualified as an expert witness on issues pertaining to the proof and calculation of damages both in antitrust and non-antitrust suits, a partial list of which is included in my personal data summary appended hereto (Appendix A.).

I have been asked by plaintiffs' counsel to review and analyze all of the available economic data supplied by plaintiffs and defendants in connection with this lawsuit, as well as public information relating to the corrugated container industry, for purposes of arriving at an estimate of damages sustained by members of the class certified by the Court in this action.

I. *Introduction*: Alternative Methodologies

Damages in antitrust cases of the nature of this action have typically been measured by one or a combination of the "before and after" or the "yardstick" methods. My Affidavit in support of plaintiffs' motion for class determination, dated July 15, 1978, states that either the before-and-after or the yardstick approach could be used in this case to show both classwide damages and damages to each class member. Having completed additional research by reviewing documents contained in the plaintiffs' and defendants' document depositories in Houston, Texas, including most of the documents of an economic nature produced in response to Grand Jury Subpoenas, studying additional data submitted by the Fibre Box Association and the Settling Defendants, and interviewing economists employed by International Paper Company and St. Regis Paper Company, I now believe that, on the basis of the data presently available, the conceptual framework likely to provide the most accurate method of estimating the overcharges made by Settling Defendants to the class in this action is a variation of the before-and-after model. The basis for this conclusion is summarized below.

The yardstick model normally compares the performance of two or more industries or firms during the period of impact of an antitrust violation to the performance of a similar industry or company that was not affected by defendants' anti-competitive practices. The use of this approach requires that the yardstick industry or firm be engaged in a similar, but not identical, line of business. Secondly, the competitive industries or firms should operate in a market structure where cost and demand conditions are similar to those the plaintiffs would have faced absent the alleged violation. This means that the yardstick firm or industry cannot be used successfully if:

1. there is disparity between the size and number of firms in the relevant market;
2. there is widespread product differentiation in the market;
3. the degree of vertical integration is significantly different between industries;
4. the barriers to entry in the respective industries are characteristically dissimilar; and/or
5. there is considerable variability in the capitalization ratios between firms or industries.

Further requirements of the yardstick approach are that the yardstick firm or industry occupy a market position similar to the position that defendants would have held absent the alleged violation. Of course, defendant's firm cannot be used as the yardstick firm. Consequently, while the yardstick theory might be useful in some circumstances, it appears to have certain limitations as a damage model with regard to estimating damages in this action.

In the first place, there is no evidence that any identifiable members of the corrugated container industry were withdrawn from anti-competitive activities for an ascertainable period during the alleged price-fixing conspiracy. Moreover, similar industries, i.e., industries under the heading Paper and Allied Products (SIC 26), such as folding cartons and fine paper, were apparently involved in similar anti-competitive activity during the same period as the alleged corrugated conspiracy. Hence, there does not appear to be available a yardstick or comparable firm or industry that is known to have been fully competitive during some identifiable period of the alleged conspiracy in the corrugated container industry.

The before-and-after approach can be employed to compare defendants' prices and/or profits in two distinct

time periods as a basis for estimating the degree of overcharge. This theory can, for example, utilize defendants' prices and/or profits in a normative and non-competitive period as a basis for determining the degree to which prices were maintained at supra-competitive levels. There are three possible variations to this approach. First, prices charged and/or profits earned prior to and during the period of impact of an antitrust violation may be interpolated to calculate the degree of overcharge. Secondly, prices charged and/or profits earned between the periods of impact of two distinct antitrust violations may be used as the basis for determining overcharge. And finally, prices charged and/or profits earned during and immediately after the period of impact may be compared. It is this latter variation which has been used to estimate the overcharge in this action.

The analysis employed here compares profits earned during and immediately after the conspiracy period to calculate the estimated overcharge, and assumes that any differences noted are the result of changing levels of competition. Net profits before taxes as a performance variable was preferable to prices for several reasons. First, net profits are the difference between total revenues (prices times quantities shipped) and total costs. This is important since, to the degree one can define a level of profits which is sufficient to pay all costs (explicit and implicit) and still entice an enterprise to continue in business, and at the same time note a divergence from that level coincident with an alleged conspiracy, the difference can be thought of as excess profits and thus the illegal overcharge to the class. Additionally, the concept of profits takes into account other macro and micro economic phenomena which also typically influence total revenues and total costs. Secondly, usable time-series price information has not been available for individual defendants. The average annual prices published by the Fibre Box Association were not suitable, since the an-

nual averages reflected prices charged by all members of the Association, including some but not all of the Settling Defendants, the non-settling defendants, as well as other firms. The Settling Defendants related that only with great difficulty and at considerable expenditures of time and money could such information be computed, and then probably only for very recent years.

II. *Research Procedures.*

My involvement in the corrugated containers litigation began on June 23, 1978, when I was contacted by Mr. Vance K. Opperman about the possibility of serving as an economic consultant with regard to class certification. I agreed to conduct the necessary studies. On July 7, 1978, I attended a meeting in Philadelphia, Pennsylvania, with the committee responsible for drafting a memorandum in support of class determination in this action. At that meeting, I specified the economic materials that would be necessary to enable me to form an opinion as to my ability to estimate damages to the proposed class and as to the most appropriate methodology for doing so. This information was provided to me, and I spent the time between July 10, 1978, and July 15, 1978, in Houston preparing an affidavit in support of class determination. The affidavit was filed with the Court on July 15, 1978. Subsequent to filing my affidavit in support of class determination I was requested by plaintiffs' counsel to begin analyzing damages as they may relate to the corrugated containers industry. This research began on July 28, 1978. A preliminary report was given by me to members of the Plaintiffs' Ad Hoc Settlement Committee on August 4, 1978. This report considered alternative damage models. It used aggregate industry statistics for purposes of estimating damages. At the same time, I attempted to analyze other sub-industries of the Paper and Pulp Industry (SIC 26) for possible utilization in a yardstick context.

With the advent of new data in December of 1978, I began revising studies I had done in July. In doing so, I made another trip to Houston to further review and analyze documents maintained in plaintiffs' and defendants' depositories. This was accomplished between December 18 and December 20, 1978. On December 20th, I presented and reviewed with Professor Jeffrey L. Harrison, a Ph.D. economist with the University of Houston School of Law, all of the materials I had gathered and written. All of the possible theories of damages were considered and analyzed for purposes of submitting an updated report to the Plaintiffs' Ad Hoc Settlement Committee. On January 4, 1979, Professor Harrison and I made a verbal report to this Committee indicating all of the theories of damages analyzed to date and the results under each alternative model. The models that were considered at the time were the yardstick theory, the before-and-after model, and several alternative sets of price prediction models using time series and least squares regression analysis. The report submitted to the Committee on January 4, 1979, concluded that a before-and-after concept was the most appropriate methodology since it was consistent with the liability issues and since the data were most complete for that formulation. It was noted at the January 4, 1979, meeting that information maintained by the Fibre Box Association (FBA) in Chicago could be useful in alternative formulations of several of the models. On January 10, 1979, I attended a meeting at the FBA headquarters in Chicago, Illinois, at which time Mr. Martin Browning answered questions with regard to the reporting and document retention procedures of the FBA. Subsequently, certain FBA documents identified as being relevant to the overall economic analysis were requested and received for our purposes of incorporating the information into the alternative damage models discussed above. Between January 10, 1979, and the present time, a considerable amount of

time was spent refining various estimates heretofore mentioned. This additional investigation has included numerous conversations with Settling Defendants' counsel to verify statistics placed in the depositories and data received by letter and telephone for purposes of this analysis. Furthermore, I spent three additional days in Houston, Texas between February 26, 1979, and February 28, 1979, further reviewing economic documents contained in both plaintiffs' and defendants' depositories. Some of the data gleaned from the depositories were subjected to computer analysis for purposes of better understanding the nature of pricing of corrugated containers and the factors that have historically affected price variations since as early as 1955.

In order to gain additional understanding of the corrugated container industry and the nature of the data being submitted by the Settling Defendants, I had conferences in New York City, New York on March 8 and March 9, 1979, with the chief economists for International Paper Company and St. Regis Paper Company. These discussions were very useful, since they provided additional background and economic information concerning the corrugated containers industry and tended to confirm the validity of our approach to estimating damages.

On March 22nd and March 23rd, Professor Harrison was present at the Analytics, Inc. offices in Excelsior, Minnesota, to assist me in reviewing, critiquing and otherwise analyzing all of the materials obtained to date. At meetings at Analytics, Inc. on March 22nd and March 23rd, attended by Mr. Jack L. Chestnut, all of the damage theories heretofore mentioned were further reviewed and analyzed in the context of their accuracy, conformity to liability issues, and realism. At that point, it was decided to review these findings with other members of the Plaintiffs' Settlement Justification Committee.

A conference call was scheduled for March 26, 1979, with members of this Committee to review the general findings and conclusions. At the same time, various problems with regard to data collection were discussed and solutions for correcting deficiences were proposed. This call was followed by another conference call on March 29th with the same individuals to confirm the progress being made. On April 4, 1979, a meeting was held in Washington, D.C. to review my conclusions with counsel for designated class representatives who had supported the settlements. At that meeting, it was decided to send all defendants a request for written verification of the data submitted pursuant to the settlement justification investigation.

III. *The Data.*

The necessary data to complete the above described analysis are sales of corrugated materials by the Settling Defendants and the resulting net profits from the sale of those products. The yearly net dollar sales of corrugated materials (gross sales of corrugated materials less returns and allowances), as represented by all Settling Defendants' records from 1970 through 1978, are summarized in Table 1. These sales figures reflect net sales less sales to other defendants and intra-company sales to the extent such information was available.

Defendants' net profits as a percent of net sales of corrugated material are also summarized in Table 1. Net profits are defined as the difference between the net sales of corrugated materials and cost of goods sold, fixed costs, and administrative expenses, prior to payment of federal and state income taxes.

Complete data for all Settling Defendants were available for the years 1970-1978 inclusive. Only scattered data before 1970 have been achieved. Record keeping procedures, changes in accounting methods, and conver-

sion to computer operations or from one mode of computer operations to another, are among the factors which have prevented Settling Defendants from being able to furnish sufficiently complete pre-1970 information.

IV. *Estimate of Overcharge.*

The during-and-after approach to estimating the overcharge was used for the following reasons. Plaintiffs' counsel's investigations indicate that the conspiracy to fix prices in the corrugated containers industry occurred as early as 1960 and continued at least until the Federal grand jury investigation began in December, 1975. Consequently, any attempt to use the 1960-1975 time period as a normative basis for price or profit comparisons would also incorporate the alleged anti-competitive pricing activity. However, to the degree that the grand jury investigation caused the elimination of the illegal conduct previously practiced, a comparison of defendants' profits during 1976-1978 with those earned in a reasonable time prior to the cessation of the illegal pricing policies provides a good basis for estimating the overcharge.

The civil suit was filed in March, 1977. Because damages cannot be claimed for more than four years prior to that time, unless the statute of limitations is tolled, I was directed by plaintiffs' counsel to use a four-year damage period assumption. It was next necessary to determine the during and after periods which reflect conspiratorial versus competitive conduct in the corrugated containers industry. An argument can be made that, immediately after the grand jury investigation, all illegal activity ceased immediately. On this assumption, there would be 33 months of damages available to the class.[1] On the other hand, it is also possible that there

[1] Suit filed March, 1977. Time period begins April 1, 1973, runs through December, 1975.

was a lag between the beginning of the grand jury investigation and the cessation of alleged illegal pricing practices. If such a lag were assumed to be a year, the damage period would be 45 months.[2] One could also project a damages period encompassing the entire 48-months immediately prior to the civil suit filing in March, 1977. All of these assumptions, in conjunction with alternative time periods for conspiratorial profit percentages, were employed as a basis for the range of estimates of the overcharge made by Settling Defendants to the class, shown in Table 2 to be between $185,753,000 and $789,036,000.

FURTHER, AFFIANT SAITH NOT.

/s/ *Richard C. Hoyt*
RICHARD C. HOYT

STATE OF MINNESOTA
COUNTY OF HENNEPIN
Subscribed and sworn to before
me this 10th day of April,
1979, at Minneapolis, Minnesota.

/s/ [notary]

[2] April 1, 1973, through December, 1976.

TABLE 1

SETTLING DEFENDANTS' NET SALES OF CORRUGATED MATERIALS AND NET PROFITS AS A PERCENT OF SALES

Year	Net Sales of Corrugated Materials by Settling [1] Defendants ($000)	Net Profits of Corrugated Materials by Settling Defendants ($000) [2]	Net Profits As a Percent of Net Sales (%)
1970	$1,652,072	$ 4,061	.24
1971	1,724,160	[39,984]	[2.31]
1972	1,957,837	23,819	1.21
1973	2,473,658	180,187	7.28
1974	2,860,359	367,660	12.85
1975	2,866,171	180,839	6.30
1976	3,325,813	125,500	3.77
1977	3,406,056	38,800	1.13
1978	3,291,282	17,796	.54

1. Source: Documents and data supplied by Defendants. 1978 net sales includes estimate for International Paper.

2. Source: Documents and data supplied by Defendants. Includes estimates for Chesapeake, 1970, and CCA, 1978.

EXHIBIT C

	1977 Net Working Capital	1977 Net Income After Taxes
Alton Box Board Co.*	$ 29,006,988	$ 2,964,067
Boise Cascade Corporation**	275,129,000	115,610,000
Chesapeake Corp. of Virginia**	19,730,000	10,281,000
Consolidated Packaging Corp.*	(8,391,000)	(7,545,000)
Container Corp. of America**	187,913,000	55,765,000
The Continental Group**	321,800,000	143,800,000
Crown Zellerbach Corporation*	367,055,000	109,152,000
Diamond International Corporation**	164,745,000	46,927,000
Dura-Containers, Inc.***	6,302,853	1,211,802
Fibreboard Corporation*	26,741,000	6,451,000
Georgia-Pacific Corporation**	460,000,000	262,000,000
Green Bay Packaging, Inc.*** (1976)	20,576,884	8,884,214
Hoerner Waldorf Corporation/ Champion International**	444,466,000	138,615,000
Inland Container Corp.**	46,163,000	21,921,000
International Paper Company**	574,500,000	233,700,000
Interstate Container Corp.***	Not available	
Longview Fibre Co.**	24,490,000	27,518,000
MacMillan Bloedel Ltd.**	292,950,000	38,349,000
The Mead Corporation**	206,563,000	98,047,000
Menasha Corporation*	32,034,586	10,100,196 (net profit)
Olinkraft, Inc.**	46,717,000	34,596,000
Owens-Illinois, Inc.**	394,175,000	91,304,000
Packaging Corp. of America*	3,408,931	21,696,617
Potlatch Corporation**	108,073,000	61,813,000
St. Joe Paper Co.***	18,834,388.89	23,792,000 (1975)
St. Regis Paper Company**	522,134,000	106,786,000
Southwest Forest Industries, Inc.**	83,863,000	16,086,000
Stone Container Corporation**	43,577,000	10,045,000
Union Camp Corporation**	203,539,000	114,664,000
U.S. Corrugated Fibrebox Co.***	3,897,820	Not available
Westvaco Corporation**	225,692,000	61,944,000
Weyerhaeuser Co.**	530,239,000	303,891,000
Willamette Industries, Inc.**	67,155,000	48,123,000

* Information for this company compiled from Dun & Bradstreet reports.

** Information for this company compiled from Moody's Industrial Manual.

*** Information for this company compiled from company financial statements.

EXHIBIT D
SETTLEMENT FUND CHART

SETTLING DEFENDANT	AMOUNT	BANK	INTEREST RATE
Boise Cascade	$ 9,891,000.00	Texas Commerce—C.D.	10.75—Matures 8/27/79; Interest Due at Maturity
Champion/Hoerner Waldorf	$24,120,000.00	First City National	Escrow
Chesapeake Corporation of Virginia	$ 3,024,000.00	Texas Commerce—C.D.	11.15—Matures 6/26/79; Interest Due at Maturity
Container Corporation of America	$34,240,000.00	Texas Commerce	Escrow
Continental Group, Incorporated	$27,430,000.00	Texas Commerce	Escrow
Diamond International Corporation	$ 1,000,000.00	Texas Commerce—C.D.	11—Matures 6/19/79; Interest Due at Maturity
Dura Containers, Incorporated	$ 750,000.00	American Fletcher National Indianapolis, Indiana	Letter of Credit
Green Bay Packaging	$ 5,557,500.00	Texas Commerce	Escrow
Inland Container Corporation	$34,627,500.00	First City National	Escrow
International Paper Company	$ 8,300,000.00 (4,150,000.00)	Texas Commerce—C.D.	8.6—Matures 8/27/79; From inception until 1/25/79 money market certificates were purchased with the interest money received; As of 1/25/79 the interest received each month purchases another C.D. which expires on the same date as the original C.D.

EXHIBIT D—Continued

SETTLEMENT FUND CHART

SETTLING DEFENDANT	AMOUNT	BANK	INTEREST RATE
	(4,150,000.00)	First City National—C.D.	8.7—Matures 8/28/79; Each month the interest received from the original C.D. purchases money market certificates
Longview Fibre Company	$ 6,450,000.00	Texas Commerce—C.D.	10.40—Matures 8/15/79; Interest Due at Maturity
MacMillan Bloedel, Incorporated	$ 8,440,000.00	Texas Commerce	Escrow
Menasha Corporation	$ 4,592,250.00	Texas Commerce	Escrow
Olinkraft, Inc.	$ 7,350,000.00	First City National	Escrow
Owens-Illinois, Incorporated	$32,700,000.00	First City National	Escrow
St. [illegible]e Paper Company	$12,468,750.00	Bank of the Southwest	Escrow
St. Regis Paper Company	$ 1,700,000.00	Texas Commerce Bank—C.D.	8.8—Matures 7/25/79; From inception until 1/25/79 money market certificates were purchased with the interest money received; As of 1/25/79 the interest received each month purchases another C.D. which expires on the same date as the original C.D.
Stone Container Corporation	$14,511,250.00	Texas Commerce	Escrow

EXHIBIT D—Continued

SETTLEMENT FUND CHART

SETTLING DEFENDANT	AMOUNT	BANK	INTEREST RATE
Union Camp Corporation	$ 7,400,000.00		
	(1,300,000.00)	Great Southern—C.D.	11.1—Matures 7/26/79; Interest compounded monthly
	(1,000,000.00)	Southern National—C.D.	11.25—Matures 7/29/79; Interest compounded monthly
	(1,350,000.00)	East End State—C.D.	11.1—Matures 6/26/79; Each month the interest received from the original C.D. purchases another which expires on the same date as the original C.D.
	(1,750,000.00)	Allied Bank of Texas—C.D.	11.125—Matures 6/26/79; Each month the interest received from the original C.D. purchases another C.D. which expires on the same date as the original C.D.
	(2,000,000.00)	First City National—C.D.	11.15—Matures 6/26/79; Interest compounded monthly

EXHIBIT D—Continued

SETTLEMENT FUND CHART

SETTLING DEFENDANT	AMOUNT	BANK	INTEREST RATE
U.S. Corrugated Fibrebox Company	$ 3,069,120.00	Texas Commerce	Escrow
Weyerhaeuser Company	$39,150,000.00		
	(19,150,000.00)	Houston National	Escrow
	(20,000,000.00)	First International	Escrow
Willamette Industries, Inc., Western Kraft East, Inc., and Corco, Inc.	$11,286,000.00	Texas Commerce	Escrow

4/14/79

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE SOUTHERN
DISTRICT OF TEXAS HOUSTON DIVISION

M.D.L. No. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

This document relates to:

ALL ACTIONS EXCEPT THOSE
IDENTIFIED ON EXHIBIT II
ANNEXED TO THE UNIFIED AND
CONSOLIDATED COMPLAINT AND

DRAPER-KING COLE, INC., ET AL.
(C.A.No. H-78-1226)
FRANKLIN CONTAINER CORP., ET AL.
(C.A.No. H-78-671)
IOWA BEEF PROCESSORS, INC.
(C.A.No. H-78-1263)

MOTION FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL ANSWER AND CROSS-CLAIM

Filed May 9, 1979

Defendant, Packaging Corporation of America ("PCA"), hereby moves the Court for leave to amend and supplement its Answer pursuant to Rules 13(g) and 15(a), Fed. R. Civ. P., to assert a Cross-Claim for contribution against Defendants, Boise Cascade Corporation, Champion International Corporation, The Chesapeake Corporation of Virginia, Container Corporation of America, The Continental Group, Inc., Corco, Inc., Diamond International Corporation, Cura-Containers, Inc., Green Bay Packaging, Inc., Hoerner Waldorf Corporation, Inland Container Corporation, International Paper Com-

pany, Longview Fibre Company, MacMillan Bloedel, Inc., MacMillan Bloedel Containers, Inc., Menasha Corporation, Olinkraft, Inc., Owens-Illinois, Inc., St. Joe Paper Company, St. Regis Paper Company, Stone Container Corporation, Union Camp Corporation, U.S. Corrugated-Fibre Box Company, Western Kraft East, Inc., Weyerhaeuser Company and Willamette Industries, Inc. (hereinafter referred to collectively as the "Settling Defendants") in the form attached as an appendix hereto, on the ground that justice so requires in order that all issues between the parties may be fully and efficiently litigated in this action.

This motion does not violate any limitation on time for filing imposed by the Local Court Rules of this Court or any special order of this Court in this litigation but the time for amending the PCA Answer as of right has expired.

PCA would further show that this Motion for Leave requesting leave to assert a Cross-Claim is in substance the same as that heretofore filed by Westvaco Corporation on or about February 27, 1979, and that as shown by Westvaco Corporation's Motion for Leave, counsel for that company conferred in person by telephone with counsel for each of the Settling Defendants and counsel for Plaintiffs (Chairman of Plaintiffs' Steering Committee), and was uniformly informed by said counsel that they intended to oppose such Motion. Subsequent to that time, twenty-three (23) of the Settling Defendants and Plaintiffs have filed written opposition to said Motion. The Motion here made by PCA seeking contribution is in substance identical with that heretofore filed by Westvaco Corporation and, under such circumstances, PCA respectfully shows the Court that the personal conference required by the rules of this Court prior to filing this Motion would and will, without doubt, meet with the uniform opposition of the Settling Defendants and Plain-

tiffs and, under such circumstances, makes unnecessary such personal conferences.

DATED: May 9, 1979

/s/ *Preston Shirley*
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[Certificate of Service omitted]

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. No. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

This Document Relates to:

ALL ACTIONS IDENTIFIED
IN EXHIBIT A HERETO

AMENDED AND SUPPLEMENTAL ANSWER OF PACKAGING CORPORATION OF AMERICA TO THE UNIFIED COMPLAINT AND ITS CROSS-CLAIM

TO THE HONORABLE JUDGE OF SAID COURT:

Packaging Corporation of America (hereinafter called "PCA") respectfully makes and files this its Amended and Supplemental Answer to the Unified and Consolidated Complaint and Its Cross-Claim, and as grounds therefor would show the Court as follows:

PCA adopts each and every defense heretofore set forth in its "Answer and Jury Demands of Packaging Corporation of America to Unified and Consolidated Complaint," heretofore filed on or about June 30, 1978, together with the prayer for relief contained therein and, in addition, now supplements and amends said Answer by the addition of its "Cross-Claim Against Settling Defendants," reading as follows:

CROSS-CLAIM AGAINST SETTLING DEFENDANTS

(1) Each of the corporations named in this paragraph are Defendants in the *Corrugated Container Antitrust*

Litigation, MDL 310, having been named as Defendants in the Consolidated Complaint, and having been named as Defendants in one or more of the predecessor complaints in the consolidated actions. Each of these corporate Defendants at all times mentioned in the complaint and in this answer were and are corporations duly organized under the laws of their respective states of incorporation as listed below.

Name of Defendant	State of Incorporation
Boise Cascade Corporation	Delaware
Champion International Corporation	New York
The Chesapeake Corporation of Virginia	Virginia
Container Corporation of America	Delaware
The Continental Group, Inc.	New York
Corco, Inc.	Ohio
Diamond International Corporation	Delaware
Dura-Containers, Inc.	Delaware
Green Bay Packaging, Inc.	Wisconsin
Hoerner Waldorf Corporation	Delaware
Inland Container Corporation	Indiana
International Paper Company	New York
Longview Fibre Company	Delaware
MacMillan Bloedel, Inc.	Alabama
MacMillan Bloedel Containers, Inc.	Delaware
Menasha Corporation	Wisconsin
Olinkraft, Inc.	Delaware
Owens-Illinois, Inc.	Ohio
St. Joe Paper Company	Florida
St. Regis Paper Company	New York
Stone Container Corporation	Illinois
Union Camp Corporation	Virginia
U.S. Corrugated-Fibre Box Company	Indiana
Western Kraft East, Inc.	Oregon
Weyerhaeuser Company	Washington
Willamette Industries, Inc.	Oregon

(2) The Defendant corporations named in Paragraph 1 hereof ("the Settling Defendants") have entered into proposed settlements ("Settlements") of the cause of action alleged in the complaint which Settlements are being submitted to the Court for approval.

(3) Under the terms of the Settlements, Plaintiffs and the Settling Defendants are requesting the Court to dismiss the complaint against the Settling Defendants and to permit these actions to proceed against all other defendants (Non-Settling Defendants) including PCA.

(4) With the possible exception of the Settling Defendants, the said *Corrugated Container Antitrust Litigation*, MDL 310, as alleged in the complaints is continuing against the Non-Settling Defendants therein.

(5) In the unlikely event that at the conclusion of the said *Corrugated Container Antitrust Litigation* judgment in an amount presently unknown should be entered against PCA, then PCA is entitled to receive appropriate contributions from the Settling Defendants.

(6) By entering into the Settlements, the Settling Defendants are attempting to avoid their obligations to make appropriate contributions to PCA, as alleged in Paragraph 5 above, in the unlikely event Plaintiffs, after trial, should obtain a judgment against PCA.

WHEREFORE, Packaging Corporation of America prays as heretofore prayed in its Answer to the Unified and Consolidated Complaint and, in addition, in the event of any judgment against it, prays for judgment over and against the Settling Defendants for (1) their respective appropriate contributions to PCA in the event there is any liability to Plaintiffs by PCA; (2) costs and disbursements of this Cross-Claim, including reasonable

attorneys' fees; and (3) such other and further relief as this Court may deem just and proper.

DATED: May 9, 1979

/s/ *Preston Shirley*
PRESTON SHIRLEY,
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700 First Hutchings-Sealy National
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OF COUNSEL:

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Houston, Texas 77001

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Galveston, Texas 77550
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EXHIBIT A

ACTIONS INCLUDED IN DEFENDANT'S ANSWER TO THE UNIFIED COMPLAINT

	Action	Civil Action Docket Number	District
1.	Adams Extract Co.	H-77-461	S.D. Texas
2.	After Six, Incorporated	H-77-805	S.D. Texas
3.	The Amberley Greeting Card Company	H-78-56	N.D. Ill.
4.	Andre-Boudin Bakeries, Inc.	H-78-53	N.D. Calif.
5.	Arcadia Furniture Corporation	H-77-790	S.D. Texas
6.	Artcraft Press, Inc.	H-77-2147	D. Minn.
7.	Austin Products Co.	H-77-782	S.D. Texas
8.	The Beaumont Company	H-78-11	S.D. N.Y.
9.	Bodines, Inc.	H-78-64	N.D. Ill.
10.	Carron Manufacturing Company	H-78-60	N.D. Ill.
11.	Co-ordinated Industries, Inc.	H-78-58	N.D. Ill.
12.	Covington Fabrics Corp.	H-78-10	S.D. N.Y.
13.	Denver Meat Company	H-77-1934	S.D. Texas
14.	Doranne of California, Inc., d/b/a Embassy Giftwares	H-77-724	S.D. Texas
15.	Douglas Furniture Corp.	H-78-54	N.D. Ill.
16.	Erie Seating Co.	H-78-68	N.D. Ill.
17.	Furniture Plastics, Inc.	H-78-59	N.D. Ill.
18.	Grist Mill Co.	H-77-849	S.D. Texas
19.	Haeger Potteries, Inc.	H-77-1457	S.D. Texas
20.	I. Kaplan, Inc.	H-78-375	E.D. Pa.
21.	Land O'Lakes, Inc.	H-78-170	D. Minn.
22.	Levee Furniture Company	H-77-793	S.D. Texas
23.	Northland Aluminum Products, Inc.	H-78-171	D. Minn.
24.	Marathon Enterprises, Inc.	H-77-584	S.D. Texas
25.	Red Wing Industries, Inc.	H-77-804	S.D. Texas
26.	Salsburg Meats, Inc.	H-78-67	N.D. Ill.
27.	Sambo's Restaurants, Inc.	H-78-63	N.D. Ill.
28.	Shell-Tex Fisheries, Ltd.	H-77-876	S.D. Texas
29.	Snyder-Craft Co., Inc.	H-78-65	N.D. Ill.
30.	Tierra Royal Potteries, Inc.	H-77-2168	D. Kansas
31.	Town House Furniture Ltd.	H-78-69	N.D. Ill.
32.	Universal Cooperatives, Inc.	H-77-885	S.D. Texas
33.	Valley Avocado Sales, Inc.	H-77-869	S.D. Texas
34.	Valley Plastics, Inc.	H-77-792	S.D. Texas
35.	West Publishing Company	H-77-791	S.D. Texas
36.	Westside Paper Company	H-78-48	C.D. Calif.
37.	Williams Manufacturing Company	H-77-789	S.D. Texas
38.	Winona Industries, Inc.	H-77-814	S.D. Texas
39.	Wittek Golf Supply Co., Inc.	H-78-55	N.D. Ill.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. No. 310

IN RE: CORRUGATED CONTAINER
ANTITRUST LITIGATION

This Document Relates To:

ALL ACTIONS IN WHICH GEORGIA-PACIFIC
CORPORATION HAS BEEN NAMED AND
SERVED AS A DEFENDANT

MOTION OF DEFENDANT GEORGIA-PACIFIC CORPORATION FOR LEAVE TO FILE AMENDED ANSWERS AND CROSS-CLAIMS

Filed May 10, 1979

Defendant Georgia-Pacific Corporation (hereinafter, "Georgia-Pacific") hereby moves the Court, pursuant to Rules 13 and 15 of the Federal Rules of Civil Procedure, for leave to amend its answers on file in MDL No. 310 to assert: (1) an additional affirmative defense, and (2) cross-claims for contribution in each action in which Georgia-Pacific has been named and served as a defendant.

The proposed additional defense and cross-claims to be added to the answers filed in each of the actions in which Georgia-Pacific has been named and served would allege the following:

[*Next Number in Sequence*] *DEFENSE*

[¶] The claims for damages, and any damages found recoverable thereunder, against defendant Georgia-Pacific by plaintiff(s), or any member of

any class represented by plaintiff(s), must be reduced by that portion of such damages appropriately allocable to any person with whom such plaintiff(s) or class member has settled, or hereafter does settle, its claims. Further, to the extent that plaintiff(s), or any member of any class represented by plaintiff(s), has entered, or hereafter does enter, into any settlements with other manufacturers of corrugated containers or sheets, plaintiff(s), or any member of any class represented by plaintiff(s), has waived, or will waive, that portion of its claim for damages appropriately allocable to said settling manufacturer.

CROSS-CLAIM

[¶] The within cross-claim is brought by defendant Georgia-Pacific pursuant to Rule 13 of the Federal Rules of Civil Procedure.

[¶] Plaintiff(s) in the Complaint [Amended Complaint, etc.; hereinafter, "the Complaint"] herein assert, *inter alia*, joint and several liability against Georgia-Pacific and the other defendants named in the Complaint for alleged participation in a purported combination and conspiracy in violation of federal antitrust laws with respect to corrugated containers and sheets, as those terms are defined in the Complaint. Georgia-Pacific has denied, and continues to deny, the material allegations of the Complaint insofar as they purport to refer or relate to Georgia-Pacific.

[¶] Plaintiff(s) further assert, *inter alia*, that certain other persons not named as defendants, and not otherwise identified, also participated in the purported combination and conspiracy alleged in the Complaint. The identities of any such alleged co-conspirators are presently unknown to Georgia-Pacific and cannot presently be determined. Georgia-

Pacific reserves the right to file third-party actions, or otherwise appropriately assert claims, for contribution against any such alleged co-conspirators as may hereinafter be identified.

[¶] In the unlikely event that plaintiff(s) and/or any member of any class represented by plaintiff(s) recover(s) a judgment in this action against Georgia-Pacific on the basis that Georgia-Pacific engaged or participated in a combination or conspiracy in violation of the federal antitrust laws, Georgia-Pacific is entitled to contribution, on such basis as may be proper under the law and facts, from any person with whom such plaintiff(s) or class member has settled, or hereafter may settle, its claims [hereinafter, "settling defendant"], to the extent Georgia-Pacific must satisfy, in whole or in part, any such judgment. In such circumstances, any settling defendant is liable to Georgia-Pacific for all or part of any portion of any such judgment that must be satisfied by Georgia-Pacific. Further, in such unlikely event, Georgia-Pacific also may be entitled to claim contribution from other persons, including defendants other than settling defendants, and Georgia-Pacific reserves the right to assert such claims at a later time.

In addition, the prayer for relief in each answer filed on behalf of Georgia-Pacific in MDL No. 310 would be amended to provide as follows:

WHEREFORE, Defendant Georgia-Pacific Corporation prays for judgment as follows:

(1) that plaintiff(s), and/or any member of any class represented by plaintiff(s), take nothing as to Georgia-Pacific by the Complaint;

(2) that judgment be entered dismissing the Complaint with prejudice as to Georgia-Pacific;

(3) that Georgia-Pacific be awarded its costs of this action together with reasonable attorneys' fees;

(4) that judgment be entered in favor of Georgia-Pacific as to its cross-claims herein, granting, if plaintiff(s) or any member of any class represented by plaintiff(s) recover(s) a judgment against Georgia-Pacific, contribution against each and every settling defendant for any amount by which that portion of the judgment that must be satisfied by Georgia-Pacific exceeds Georgia-Pacific's appropriate share, as determined under such basis for contribution as may be proper under the law and facts, of the aggregate damages awarded to plaintiff(s) or any class member; and

(5) that the Court order such other, further, and different relief as may be just and proper.

This motion is made upon the grounds that justice so requires in order that all issues among the parties may be fully litigated in this action.

A proposed form of Order is attached to this Motion.

Dated: May 9, 1979

Respectfully submitted,

ECKERT, SEAMANS, CHERIN & MELLOTT

By /s/ *Cloyd R. Mellott*
CLOYD R. MELLOTT
Attorney-in-Charge for
Georgia-Pacific Corporation
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(412) 566-6000

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. No. 310

IN RE: CORRUGATED CONTAINER
ANTITRUST LITIGATION

This Document Relates To:

ALL ACTIONS IN WHICH GEORGIA-PACIFIC
CORPORATION HAS BEEN NAMED AND
SERVED AS A DEFENDANT

PRETRIAL ORDER NO.

Defendant Georgia-Pacific Corporation having moved for leave to amend its answers herein, and it appearing to the Court that, pursuant to Rules 13 and 15 of the Federal Rules of Civil Procedure, such leave should be granted,

IT IS HEREBY ORDERED, that Defendant Georgia-Pacific is hereby granted leave to amend its answers substantially in the form specified in its Motion for Leave to File Amended Answers and Cross-Claims, dated May 9, 1979.

Decided: May __, 1979

_____
United States District Judge

[Certificate of Service omitted]

IN THE DISTRICT COURT OF THE UNITE STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL Docket No. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

OBJECTIONS OF CERTAIN ACTIVE AND RESERVE CLASS REPRESENTATIVES TO PRELIMINARY APPROVAL OF THE PROPOSED SETTLEMENTS

* * * *

* * * 376 F.2d 206, 211 (8th Cir. 1967); and *Bray* v. *Safeway Stores, Inc.*, 392 F.Supp. 851, 864 (N.D.Cal. 1975)

Herein, comparison of price levels prevailing during the last four years of the conspiracy (1974-1977) with the price level prevailing following termination of the conspiracy in January of 1978 dramatically demonstrates the severe impact which the conspiracy had upon the prices paid by class members for corrugated containers and sheets. Comparison of the price levels prevailing during the conspiracy period 1974 to 1977 and the price levels which would have prevailed during that period absent the conspiracy reveals class-wide single damages for the period 1974-1977 of $1.972 billion on defendants' sales and an average price overcharge for that period of 11.2%. See *Report and Affidavit of Professor Albert Madansky*, Appendix B hereto. The same analysis reveals class-wide single damages on settling defendants' sales of $1.395 billion. The settlements before this Court therefore amount to only 15.1% of single damages on defendants' sales during the period 1974-1977 and to only 21.4% of single damages on settling defendants' sales during the period 1974-1977.

Professor Madansky's price study also dramatically demonstrates the gradual dissipation of the conspiracy and its effect on prices between June of 1977 and March of 1978 as evidenced by a significant drop in corrugated prices during that period.

VIII.

THE RISK OF "ILLINOIS BRICK LEGISLATION" IS DE MINIMIS

In arguing that the risk of "*Illinois Brick* Legislation" poses a real threat to direct purchaser recovery, proponents of the proposed settlements fail to note that similar *Illinois Brick* legislation was introduced and * * *

* * * *

IN THE DISTRICT COURT OF
THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. No. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

This document relates to:

ALL ACTIONS EXCEPT THOSE
IDENTIFIED ON EXHIBIT II
ANNEXED TO THE UNIFIED AND
CONSOLIDATED COMPLAINT AND

DRAPER-KING COLE, INC., ET AL.
(C.A.No. H-78-1226)
FRANKLIN CONTAINER CORP., ET AL
(C.A.No. H-78-671)
IOWA BEEF PROCESSORS, INC.
(C.A.No. H-78-1263)

MOTION FOR LEAVE TO FILE AMENDED ANSWER AND CROSS-CLAIM

Filed May 21, 1979

Defendant, Packaging Corporation of America ("PCA"), hereby moves the Court for leave to amend its Answer pursuant to Rules 13(g) and 15(a), Fed. R. Civ. P., and to assert a Cross-Claim for contribution against Defendants, Boise Casade Corporation, Champion International Corporation, The Chesapeake Corporation of Virginia, Container Corporation of America, The Continental Group, Inc., Corco, Inc., Diamond International Corporation, Dura-Containers, Inc., Green Bay Packag-

ing, Inc., Hoerner Waldorf Corporation, Inland Container Corporation, International Paper Company, Longview Fibre Company, MacMillan Bloedel, Inc., MacMillan Bloedel Containers, Inc., Menasha Corporation, Olinkraft, Inc., Owens-Illinois, Inc., St. Joe Paper Company, St. Regis Paper Company, Stone Container Corporation, Union Camp Corporation, U. S. Corrugated-Fibre Box Company, Western Kraft East, Inc., Weyerhaeuser Company and Willamette Industries, Inc. (hereinafter referred to collectively as the "Settling Defendants") in the form attached as an appendix hereto, on the ground that justice so requires in order that all issues between the parties may be fully and efficiently litigated in this action.

This motion does not violate any limitation on time for filing imposed by the Local Court Rules of this Court or any special order of this Court in this litigation but the time for amending the PCA Answer as of right has expired. This motion further is made at such time as to not cause any delay in the prosecution of this cause and development of the evidence in this cause and is timely made and presented.

PCA would further show that this Motion for Leave is in substance the same as that heretofore filed by Westvaco Corporation on or about February 27, 1979, and that as shown by Westvaco Corporation's Motion for Leave, counsel for that company conferred in person by telephone with counsel for each of the Settling Defendants and counsel for Plaintiffs (Chairman of Plaintiffs' Steering Committee), and was uniformly informed by said counsel that they intended to oppose such Motion. Subsequent to that time, twenty-three (23) of the Settling Defendants and Plaintiffs have filed written opposition to said Motion and in open Court opposed the granting of such Motion. The Motion here made by PCA is in substance identical with that heretofore filed by

Westvaco Corporation and, under such circumstances, PCA respectfully shows the Court that the personal conference required by the rules of this Court prior to filing this Motion would, will and has met with the uniform opposition of the Settling Defendants and Plaintiffs and, under such circumstances, makes unnecessary such personal conferences.

DATED: May 17, 1979

/s/ *Preston Shirley*
PRESTON SHIRLEY
Attorney in Charge for
Packaging Corporation of America
700 First Hutchings-Sealy National
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Galveston, Texas 77550
(713) 488-8716

OF COUNSEL:

JERRY P. FORTENBERRY
Attorney at Law
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IN THE DISTRICT COURT OF
THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. No. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

This Document Relates to:

ALL ACTIONS IDENTIFIED
IN EXHIBIT A HERETO

AMENDED ANSWER OF PACKAGING CORPORATION OF AMERICA TO THE UNIFIED COMPLAINT AND ITS CROSS-CLAIM

TO THE HONORABLE JUDGE OF SAID COURT:

Packaging Corporation of America (hereinafter called "Defendant") hereby makes and files its Amended Answers to the Unified and Consolidated Complaint (hereinafter called "Unified Complaint") and separately for and to each and every civil action identified in Exhibit A attached hereto, but in one set of papers for the convenience of the Court and the parties. Defendant does so pursuant to and in accordance with Pretrial Order No. 4 and the clarification of the Unified Complaint set forth in the Stipulation between the parties incorporated therein. The inclusion of these Answers in a single document shall not affect the remand of any action transferred to this Court for coordinated pretrial purposes.

In support of its Answers, Defendant says as follows:

I.

FIRST DEFENSE

Defendant's actions have been lawful, and Plaintiffs have not suffered any injury to their business or property by reason of any act or omission of Defendant.

II.

SECOND DEFENSE

The Unified Complaint fails to state a claim upon which relief can be granted.

III.

THIRD DEFENSE

Plaintiffs' claims are barred in whole or in part by the applicable statute of limitations and by Plaintiffs' laches.

IV.

FOURTH DEFENSE

This action fails to satisfy the requirements of Rule 23, Fed. R. Civ. P., and may not be maintained as a class action.

V.

FIFTH DEFENSE

Defendant responds to the correspondingly numbered paragraphs of the Unifed Complaint as follows:

1. Defendant admits that the Unified Complaint purports to be filed pursuant to a certain order of the Court and purports to amend certain complaints identified in

Exhibit I to the Unified Complaint. Defendant avers the purpose and effect of the Unified Complaint is set forth in the Stipulation between the parties incorporated in Pretrial Order No. 4.

2. Defendant admits that each of the actions identified in Exhibit A purports to arise under Section 1 of the Sherman Act, but denies the remaining allegations of paragraph 2.

3. Defendant admits that jurisdiction purports to be based on certain cited statutes, but denies the remaining allegations of paragraph 3.

4. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 4 as to other Defendants. As to those actions identified in Exhibit A attached hereto, Defendant admits that it maintains an office or plant, transacts business, is found, or has an agent within the district wherein each such action was commenced. Defendant denies the remaining allegations of paragraph 4, and moves to strike all references in paragraph 4 to other litigation, to other districts and to 28 U.S.C. § 1407.

5. Defendant admits the allegations of paragraph 5.

6-7. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 6 and 7.

8. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 8 as to other Defendants. Defendant admits that it is incorporated under the laws of the State of Delaware, that it has a principal place of business in Evanston, Illinois, and that during all or part of the period covered by this Unified Complaint it has manufactured and sold corrugated containers and corrugated sheets in certain geographical areas in the United States.

Defendant denies the remaining allegation of paragraph 8.

9-10. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 9 and 10.

11. Defendant admits that the principal office of the Fibre Box Association is in Chicago, Illinois, but denies the remaining allegations of paragraph 11.

12. Defendant denies the allegations of paragraph 12.

13. Defendant admits that Plaintiffs purport to bring these actions as class actions, but denies the remaining allegations of paragraph 13.

14. Paragraph 14 purports to define corrugated containers and therefore does not require a response; but Defendants avers that paragraph 14 does not, in all respects, reflect a generally accurate definition.

15. Defendant is without knowledge or information sufficient to form a belief as to whether corrugated containers accounted for approximately 18 percent of all packaging sales in 1975. Defendant admits each and every other allegation of paragraph 15, except denies that corrugated containers are used solely as shipping containers.

16. Defendant admits that it has sold corrugated containers and corrugated sheets in certain geographical areas of the United States during all or part of the time period covered by this Unified Complaint. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 16 as to other Defendants.

17. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 17 as to other Defendants. Defendant admits that it has sold and shipped corrugated containers

and corrugated sheets to certain customers located outside of the states of manufacture and that certain materials used by Defendant in manufacturing corrugated containers and corrugated sheets were shipped into the states of manufacture. Defendant denies the remaining allegations of paragraph 17.

18-22. Defendant denies each and every allegation of paragraphs 18 through 22.

23. Defendant is without knowledge or information sufficient to form a belief as to purchases, if any, by Plaintiffs or others. Defendant denies the remaining allegation of paragraph 23.

24. Defendant denies the allegations of paragraph 24.

VI.

SIXTH DEFENSE

By virtue of the settlements entered into between Plaintiffs and other Defendants, Plaintiffs have waived that portion of their claim for damages fairly allocable to the Settling Defendants, and have in substance settled that portion of any cause of action and damages fairly allocable to the Settling Defendants. Under such circumstances, while denying that any cause of action exists against it, Defendant asserts that, in any event, exclusion of the Settling Defendants' share of the market is required.

CROSS-CLAIM AGAINST SETTLING DEFENDANTS

(1) Each of the corporations named in this paragraph are Defendants in the *Corrugated Container Antitrust Litigation*, MDL 310, having been named as Defendants in the Consolidated Complaint, and having been named as Defendants in one or more of the predecessor

complaints in the consolidated actions. Each of these corporate defendants at all times mentioned in the complaint and in this answer were and are corporations duly organized under the laws of their respective states of incorporation as listed below.

Name of Defendant	State of Incorporation
Boise Cascade Corporation	Delaware
Champion International Corporation	New York
The Chesapeake Corporation of Virginia	Virginia
Container Corporation of America	Delaware
The Continental Group, Inc.	New York
Corco, Inc.	Ohio
Diamond International Corporation	Delaware
Dura-Containers, Inc.	Delaware
Green Bay Packaging, Inc.	Wisconsin
Hoerner Waldorf Corporation	Delaware
Inland Container Corporation	Indiana
International Paper Company	New York
Longview Fibre Company	Delaware
MacMillan Bloedel, Inc.	Alabama
MacMillan Bloedel Containers, Inc.	Delaware
Menasha Corporation	Wisconsin
Olinkraft, Inc.	Delaware
Owens-Illinois, Inc.	Ohio
St. Joe Paper Company	Florida
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Western Kraft East, Inc.	Oregon
Weyerhaeuser Company	Washington
Willamette Industries, Inc.	Oregon

(2) The Defendant corporations named in Paragraph 1 hereof ("the Settling Defendants") have entered into proposed settlements ("Settlements") of the cause of

action alleged in the complaint which Settlements are submitted to the Court for approval.

(3) Under the terms of the Settlements, Plaintiffs and the Settling Defendants are requesting the Court to dismiss the complaint against the Settling Defendants and to permit these actions to proceed against all other defendants (Non-Settling Defendants) including Packaging Corporation of America (PCA).

(4) With the possible exception of the Settling Defendants, the said *Corrugated Container Antitrust Litigation*, MDL 310, as alleged in the complaints is continuing against the Non-Settling Defendants therein.

(5) In the unlikely event that at the conclusion of the said *Corrugated Container Antitrust Litigation* judgment in an amount presently unknown should be entered against PCA, then PCA is entitled to receive appropriate contributions from the Settling Defendants.

(6) By entering into the Settlements, the Settling Defendants are attempting to avoid their obligations to make appropriate contributions to PCA, as alleged in Paragraph 5 above, in the unlikely event Plaintiffs, after trial, should obtain a judgment against PCA.

WHEREFORE, having fully answered each and every action included in the Unified Complaint, Defendant prays that this Honorable Court enter judgment:

(1) Dismissing the Unified Complaint and each and every action identified in Exhibit A hereto with prejudice;

(2) Striking from the Complaint that language identified in paragraph 4 of this Answer;

(3) Denying Plaintiffs any of the relief for which they pray against Defendant;

(4) Denying that this action can be maintained as a class action pursuant to Rule 23, Fed. R. Civ. P.;

(5) Granting Defendant such other and further relief as the Court may deem just and proper, including Defendant's attorneys' fees, costs and other expenses.

(6) Defendant further prays, in the alternative, that in the event any judgment be rendered against it, it have judgment over against the Settling Defendants for contribution against Settling Defendants and for costs and disbursements of this Cross-Claim, including reasonable counsel fees and for such other and further relief as this Court may deem just and proper.

DATED: May 17, 1979

/s/ *Preston Shirley*
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OF COUNSEL:

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EXHIBIT A

ACTIONS INCLUDED IN DEFENDANT'S ANSWER TO THE UNIFIED COMPLAINT

	Action	Civil Action Docket Number	District
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6.	Artcraft Press, Inc.	H-77-2147	D. Minn.
7.	Austin Products Co.	H-77-782	S.D. Texas
8.	The Beaumont Company	H-78-11	S.D. N.Y.
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11.	Co-ordinated Industries, Inc.	H-78-58	N.D. Ill.
12.	Covington Fabrics Corp.	H-78-10	S.D. N.Y.
13.	Denver Meat Company	H-77-1934	S.D. Texas
14.	Doranne of California, Inc., d/b/a Embassy Giftwares	H-77-724	S.D. Texas
15.	Douglas Furniture Corp.	H-78-54	N.D. Ill.
16.	Erie Seating Co.	H-78-68	N.D. Ill.
17.	Furniture Plastics, Inc.	H-78-59	N.D. Ill.
18.	Grist Mill Co.	H-77-849	S.D. Texas
19.	Haeger Potteries, Inc.	H-77-1457	S.D. Texas
20.	I. Kaplan, Inc.	H-78-375	E.D. Pa.
21.	Land O'Lakes, Inc.	H-78-170	D. Minn.
22.	Levee Furniture Company	H-77-793	S.D. Texas
23.	Northland Aluminum Products, Inc.	H-78-171	D. Minn.
24.	Marathon Enterprises, Inc.	H-77-584	S.D. Texas
25.	Red Wing Industries, Inc.	H-77-804	S.D. Texas
26.	Salsburg Meats, Inc.	H-78-67	N.D. Ill.
27.	Sambo's Restaurants, Inc.	H-78-63	N.D. Ill.
28.	Shell-Tex Fisheries, Ltd.	H-77-876	S.D. Texas
29.	Snyder-Craft Co., Inc.	H-78-65	N.D. Ill.
30.	Tierra Royal Potteries, Inc.	H-77-2168	D. Kansas
31.	Town House Furniture Ltd.	H-78-69	N.D. Ill.
32.	Universal Cooperatives, Inc.	H-77-885	S.D. Texas
33.	Valley Avocado Sales, Inc.	H-77-869	S.D. Texas
34.	Valley Plastics, Inc.	H-77-792	S.D. Texas
35.	West Publishing Company	H-77-791	S.D. Texas
36.	Westside Paper Company	H-78-48	C.D. Calif.
37.	Williams Manufacturing Company	H-77-789	S.D. Texas
38.	Winona Industries, Inc.	H-77-814	S.D. Texas
39.	Wittek Golf Supply Co., Inc.	H-78-55	N.D. Ill.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

M.D.L. No. 310
(All Cases)

PRETRIAL ORDER NO. 13

Filed May 30, 1979

On May 16, 1979, a pretrial conference was held before the court, at which counsel were furnished an opportunity to present arguments, proposals, and comments to the court on the numerous motions pending. After giving careful consideration to all the memoranda, briefs, and arguments presented, the court enters the following orders:

1. Various non-settling defendants have filed motions for leave to file cross-claims for contribution against settling defendants. This question has been very thoroughly briefed by all concerned and the court has concluded that these motions should be DENIED. The reasons for this decision are set forth in the attached memorandum, which is incorporated herein. All cross-claims for contribution which have been filed are dismissed with prejudice; and there being no just reason for delay, this decision is entered as a final judgment pursuant to Rule 54(b), F.R.C.P.

2. Various non-settling defendants have requested leave to file amended or supplemental answers which would set forth as an affirmative defense plaintiffs' waiver of so much of their total claim as could be fairly allocated to the settling defendants. The court finds no

rule of law that would prevent an injured plaintiff from recovering all his proven damages from any non-settling joint intentional tortfeasor, less the amounts actually paid in settlement by other joint tortfeasors. The cases dealing with negligent joint tortfeasors in other areas of law are not controlling. Therefore these motions are DENIED.

3. Mead's motion to decertify the "class and sub-class" as to non-settling defendants is DENIED.

4. Container Corporation's motion to decertify the sheet plant subclass and to exclude sheet plants from further class status is DENIED.

5. The motion of St. Joe Paper Company, joined in by various other settling defendants, that the sheet plant sub-class be merged with the container purchaser sub-class is DENIED at this time because of problems with allocation of the post-January 5, 1979 settlements between sub-classes. Should the sub-classes arrive at a resolution of these problems, this motion may be reurged.

6. Plaintiffs' motion for rehearing with respect to paragraph 11 of Pretrial Order No. 11 having been granted, and it appearing to the court that plaintiffs' joint objections to defendants' request for financial information from privately held plaintiff companies should have been sustained it is hereby ORDERED that Pretrial Order No. 11, paragraph 11 be modified to read, "plaintiffs' joint objection to defendants' request for documents number 15, requesting financial data on plaintiff companies not publicly held, is SUSTAINED."

7. Plaintiffs' motion for an order concerning videotape and telephone depositions is GRANTED as modified herein:

A. The parties shall be authorized, without further order, to record the deposition testimony of any witness by means of videotape, unless such recording shall be objected to by counsel representing the wit-

ness or any party not less than ten (10) days prior to the scheduled date of deposition. Absent such objection, the use of videotape equipment shall be governed by the following procedures:

(i). The deposition of any witness noticed by any party may be recorded on videotape so long as the testimony of each witness is also simultaneously recorded, and later transcribed, by an independent certified court reporter. The written transcript prepared by the reporter shall constitute the official record of the deposition.

(ii). The witnesses shall be first duly sworn on camera by an officer authorized to administer oaths.

(iii). The camera and all of the collateral videotape equipment used in any deposition shall be constructed and operating to current state-of-the-art standards and shall be utilized to record the depositions in a fair and objective manner; the videotape operator shall further certify to the court and to all counsel of that fact. The camera or cameras shall be focused primarily on the witness but the operator may, by switching camera from time to time, record the witness's counsel and examining counsel, as well as charts, photographs, or exhibits. Only the witness, his counsel, and the examining counsel shall be shown, except for scenes of all counsel to identify those present at the depositions. Zooming with the lens of the camera shall be avoided. No "close-up" shorts of the witness will be permitted; at least the head and upper body of the witness shall be visible whenever the witness is on camera.

(iv). The videotape operator shall furnish a sufficient number of microphones, of good quality, to enable the witness, his attorney, and each

attorney making objection and each attorney conducting direct or cross examination to be heard.

(v). No supplementary lighting shall be used. Videotaped depositions must be taken in rooms permanently fitted with lighting adequate to the needs of the videotape operator.

(vi). No attorney or party shall give any instruction to the videotape operator before or during the course of the depositions as to the techniques to be employed, other than to supply him with a copy of this order and discuss it with him, in the presence of at least one opposing counsel and the attorney for the deponent.

(vii). The videotape operator shall certify under oath that he has read and understands this order and that the proceedings have been recorded accurately and in compliance with the terms of this order and that the videotape accurately reflects such recordation.

(viii). The cost of producing the original videotape of a witness' entire deposition shall be borne by the party requesting the videotape of that witness, and one (1) copy on good quality tape shall be provided to opposing counsel without cost by the party requesting the videotape deposition and such copy shall be placed in the document depository of opposing counsel. The original videotape recording shall be preserved in the custody of the videotape operator in its original condition until further order from the court. Any party or witness may order an additional copy of the original videotape from the videotape operator at its own expense, but no copies shall be provided to anyone other than parties or the witness without prior court approval.

(j). Pretrial Order No. 6, Paragraph 20, is hereby amended to provide that videotapes shall be prepared for review promptly, as deposition transcripts must be.

B. In order to alert counsel as soon as practical to a possible invocation of Fifth Amendment privilege claim by a witness, and thus reduce the burden of time and expense on numerous counsel who might otherwise appear for a deposition of that witness, Pretrial Order No. 6, Paragraph 26, is hereby amended to provide that where counsel for a party knows that a noticed witness is represented by independent counsel, he shall also provide the plaintiffs with the name and address of such independent counsel within ten (10) days of receipt of notice. Prior to the taking of the deposition of any witness noticed by plaintiffs or defendants, the parties shall exercise their best efforts to ascertain whether such witness intends to refuse to answer questions which the witness anticipates may be asked at the deposition based on the assertion by the witness of his Fifth Amendment privilege against self-incrimination. Any party or counsel for a party who learns that a witness whose deposition has been noticed intends to refuse to answer based on the assertion of the privilege shall promptly notify the party requesting the deposition.

C. The parties may, in their discretion, take by means of telephone the deposition of any witness who has indicated that he intends to refuse to answer questions based on the assertion by him of his Fifth Amendment privileges against self-incrimination. The following procedures shall govern the taking of such telephonic depositions:

(i). Not less than seven (7) days prior to the date set for the deposition of a witness who has indicated that he will refuse on constitutional grounds to answer the questions that might be

put to him, any party may elect to take such deposition by means of telephone by notifying the witness (or his counsel, where known) and the liaison counsel for all parties of:

(a). the time and place where the court reporter will swear the witness and record the deposition; and

(b). the name, address and telephone number of the court reporter who will record the deposition.

(ii). Not less than twenty-four (24) hours before the time set for the deposition, counsel for any party may elect to participate therein telephonically by notifying the court reporter of his desire to do so and by providing the court reporter with the telephone number at which such counsel can be reached at the time of the deposition. No one other than the witness, his counsel, and the court reporter shall be physically present at the telephonic deposition.

(iii). The court reporter shall be responsible for setting up the telephone conference call to include all counsel who have indicated a desire to participate telephonically. Each party so participating shall bear his pro rata share of the cost of the conference call.

(iv). Any such telephonic deposition shall be conducted by means of a telephone conference call in a manner which permits the witness and his counsel, the court reporter, the designated representatives of plaintiffs' and defendants' counsel and any other counsel who has timely requested to participate in the proceedings. Any such deposition shall be simultaneously recorded in the presence of the witness by a certified court reporter who has sworn the witness and who listens to the questions over a speaker tele-

phone. During such deposition only one counsel shall speak at a time, and each attorney speaking shall identify himself each time he speaks. Failure of counsel to conduct themselves in such fashion will permit the court reporter to terminate the telephonic deposition. If a telephone connection of adequate quality cannot be maintained. [sic] The written transcript prepared by the reporter shall constitute the official record of the deposition. Counsel and the court reporter shall be permitted to tape record the telephonic deposition proceedings if they so desire, provided all counsel participating in the conference call and the person being deposed are advised the recording is being made and consent thereto.

(v). At any time prior to the deposition, the parties may submit to the court reporter in a sealed envelope any documents which they desire to be used in connection with the deposition. Counsel submitting documents shall also make available copies of such documents to the liaison counsel for all parties prior to the taking of such deposition. At the direction of counsel conducting the deposition, the reporter shall display such documents to the deponent, and provide copies to the deponent or his lawyer. The reporter shall keep the originals of all such documents together with the transcript of the deposition.

(vi). In the event that a deponent responds to any question (except as to his name and address) otherwise than by refusing to answer based on the assertion by him of his Fifth Amendment privilege against self-incrimination, counsel conducting the deposition may suspend the taking of the deposition and resume the deposition in person at an appropriate time and place, but on not less than twenty (20) days'

notice. Such suspension shall not be deemed an adjournment pursuant to Pretrial Order No. 6, paragraph 19. At the conclusion of the direct telephonic examination of any deponent asserting privilege, any counsel participating in the deposition who wishes to cross-examine the witness may either do so during the conference call or in person at a time and place to be specified by that counsel.

(vii). Any deposition taken by means of telephone in accordance with the provision of this Order shall have the same force and effect and may be used in the same manner as a deposition taken in person in accordance with the provisions of the Federal Rules of Civil Procedure.

D. (1) The parties shall, at their expense, produce their present employees at the times and places scheduled for their depositions in accordance with PTO No. 6, paragraph 10.

(2) The parties shall exercise their best efforts to produce their former employees (other than those who are now employed by a party) at the times and places scheduled for their depositions as specified in the notices of depositions filed by the plaintiffs and defendants. The party requesting the deposition of any such witness shall be responsible for paying the reasonable actual travel expenses (but not other expenses) of the witness, in addition to the statutory witness fee.

E. The deposition Attendance Order referred to in paragraph 15 of PTO No. 6 may be served upon a non-party witness by mailing a copy of same to such witness certified, return-receipt-requested and the signed receipt shall constitute proof of service. Service upon a witness presently employed by a defendant herein may be accomplished by serving said defendant.

8. The following briefing schedule shall apply to plaintiffs' motion regarding disclosure of materials in the government document depository:

Defendants and the United States shall have until May 24, 1979 to respond.

Plaintiffs shall have until May 31, 1979 to reply.

Individual witnesses shall have until June 1, 1979 to file any responses they wish the court to consider.

A hearing is hereby set for June 4, 1979 at 10:00 A.M. on this question.

9. Plaintiffs' motion for preliminary approval of class settlements with the following defendants is GRANTED: Boise Cascade, Champion International, Chesapeake Corporation of Virginia, Consolidated Packaging, Container Corporation of America, Diamond International, Dura Containers, Green Bay Packaging, Inland Container, International Paper (as amended), Longview Fibre, MacMillan Bloedel, Menasha, Olinkraft, Owens Illinois, St. Joe Paper, St. Regis Paper (as amended), Stone Container, Union Camp, U. S. Corrugated Fibre Box, Weyerhaeuser, and Williamette. Attached hereto and made a part hereof are the court's findings of fact and conclusions of law with respect to these settlements.

10. The court having concluded that the settlements preliminarily approved by this order are fair and adequate and negotiated in good faith, at arm's length, and with authority, there appears no good cause for deposing Messrs. Susman, Montague, Hoyt, Robertson, and Harrison on those subjects. Further, the notice of depositions was not timely filed. For these reasons, the notice of depositions filed May 2, 1979, and the subpoenas relating thereto are hereby quashed.

DONE at Houston, Texas, this 30th day of May, 1979.

/s/ John V. Singleton, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

M.D.L. No. 310
(All Cases)

MEMORANDUM OPINION

Filed May 30, 1979

On May 16, 1979, a pretrial hearing was held before this court on the motions of Westvaco, Packaging Corporation of America, Georgia-Pacific, and Crown Zellerbach for leave to amend their answers to assert cross-claims for contribution against certain other defendants who have entered into settlement agreements with plaintiffs' class. The question presented by these motions is whether, in an antitrust action such as this, contribution among defendants is proper. This question has been very thoroughly briefed and argued. It is the conclusion of the court, after careful consideration of all the arguments presented, that such a claim would not be proper in this case.

The threshold question is whether contribution should be allowed in any antitrust case brought under the federal laws. The Eighth Circuit, in the recent case of *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 1979-1 Trade Cas. ¶ 62,485 (8th Cir. 1979), has allowed contribution in an antitrust action; no other circuit has done so. In fact, the law has appeared uniformly contrary to the position advanced by Westvaco. *Goldlawr, Inc.* v. *Shubert*, 276 F.2d 614, 616 (3d Cir. 1960); *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1977-2

Trade Cas. ¶ 61,698 (D. Utah 1977); *El Camino Glass* v. *Sunglo Glass Co.*, 1977-1 Trade Cas. ¶ 61,533 (N.D. Calif. 1976); *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F. Supp. 1339 (S.D. N.Y. 1969). In recent years, however, it is argued that a trend towards allowing contribution can be discerned. Two cases are currently on appeal before the Fifth Circuit which may clarify this point, *Abraham Construction Corp.* v. *Texas Industries, Inc.*, No. 78-1788, and *Iowa Beef Processors, Inc.* v. *Spencer Foods, Inc.*, No. 78-3346; and it has been suggested that this court defer ruling on this question until it has the benefit of that clarification.

It is the court's conclusion, however, that contribution would be inappropriate in these cases even should it be proper in some federal antitrust cases, and for that reason the court will not delay its ruling.

It appears that Westvaco seeks contribution primarily to avoid the coercive impact to it, as a late-settling or non-settling defendant, of the possibility of enormous damages being assessed against it. That this possibility is inherently coercive is undisputable—the estimates of total damages in these cases range from just under two hundred million dollars to over one billion dollars, and of course any jury verdict would be subject to the trebling provisions of the Act. Twenty-three defendants, representing approximately 80% of the market, have entered into settlement agreements for a total sum of almost three hundred million dollars. Even a defendant relatively certain of a judgment in his favor must have serious doubts about risking such exposure by going to trial. Movants here seek a means to insure that they will not be ultimately liable for more than their market share, or perhaps than their percentage of culpability, in the event they go to trial and lose.

On the other hand, the settling defendants and class plaintiffs urge that allowing contribution in any case

such as this will make settlements impossible to achieve and will thereby contribute to the already notorious complexity and unmanageability of antitrust cases. Defendants have little incentive to buy peace from plaintiffs if they may be obliged to litigate the same claims against other defendants. Further complications to the efficient management of a suit such as this would arise from the processing of the many possible cross-claims and impleader actions and from the fact that joint defense efforts, with their savings in court, staff, and attorney time, would be hindered or deterred altogether. The court has recently completed the trial of United States of America vs. International Paper, et al and United States of America vs. Boise Cascade, et al.; those cases involved the prosecution of nine defendants with well-coordinated joint defense efforts. The trial lasted approximately fifteen weeks. It is difficult to judicially foresee how these cases, with the class and opt-out plaintiffs and thirty-seven defendants asserting cross-claims against each other, could be managed. Liberal use of severance would be required for trial, and that would lead to the consumption of courts' time in duplicative efforts. It seems to the court that a policy of allowing contribution would complicate litigation procedurally, frustrate settlements, and inhibit joint defense efforts to such an extent that this type of litigation would be virtually impossible to manage. Weighing the possible unfairness to a defendant such as Westvaco against the ills which would arise from contribution in such a case as this leads this court to the belief that contribution would be improper and undesirable. The court is also mindful of the arguments advanced by Judge Hanson in his dissent in *Professional Beauty Supply* that the problems attendant on such a rule would be likely to deter private plaintiffs from exercising their option to serve as private attorneys general in the antitrust area. 1979-1 Trade Cas. ¶ 62,485 at 76,852.

In addition to the management problems such a rule would present, the court finds Westvaco's arguments unpersuasive in the context of intentional torts. The court notes that even in jurisdictions which allow contribution among joint tortfeasors it is usual to restrict such recovery to negligent joint tortfeasors. The deterrent policies underlying the Sherman and Clayton Acts would appear to be best served by retaining a rule which can result in any defendant found to have engaged in such intentional wrongful acts being held liable for the full sum of injuries caused by its acts and those of its partners. It must, of course, be borne in mind at all times that a defendant who is found not to be an intentional violator of the antitrust laws will not pay a penny in damages.

For these reasons, the court does not feel that contribution should be allowed in any such antitrust case as this. If, however, the rule were eventually to be otherwise in this circuit, there is a compelling reason not to grant the motions of Westvaco and the three other defendants in this case, at this time. Such a rule should not be applied retroactively where the settling litigants have relied on unvarying past precedent in reaching agreements with the plaintiffs' class and in undertaking joint defense efforts which may have worked very substantially to their detriment should those defendants who have not chosen to settle be allowed to use information gained under the guise of mutual aid to bring cross-claims now. The Supreme Court has listed three factors to consider on the retroactivity of a new rule of law: that it work a substantial change in law upon which parties may have relied; that its policy be furthered by retrospective application; and that such application not be unfair. *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-07 (1971). In applying these three factors to the case in hand, it is clear that a holding by this court now, or by the Fifth Circuit on the appeals before it, that

contribution claims are proper under federal antitrust law would be a substantial departure from existing law. If such a rule is ultimately effectuated, the policy behind it must be one of fairness to non-settling defendants; perhaps it could be argued that that policy would be favored by retrospective application, but in this court's view fairness does not require allowing non-settling defendants to participate in joint defense efforts and use information gained there against those who have chosen to settle, in reliance on the then current state of the law. As to the third factor it seems unfair to all parties to change the rules underlying settlement in so complex a case at this stage of the litigation. Settling defendants have paid three hundred million dollars to buy their peace. Almost a year has passed since the first settlement agreement was reached. The settling defendants, under the terms of their settlements, have been cooperating with class plaintiffs in their discovery. As has been mentioned, all defendants, at this court's request, participated in joint defense work. It would be inequitable to apply such a rule retroactively to this case.

For these reasons, the motions of the several non-settling defendants to amend their answers to assert cross-claims for contribution are DENIED.

DONE at Houston, Texas this 30th day of May, 1979.

/s/ *John V. Singleton, Jr.*
United States District Judge

IN THE DISTRICT COURT OF
THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:
CORRUGATED CONTAINER
ANTITRUST LITIGATION

M.D.L. No. 310

FINDINGS OF FACT AND CONCLUSIONS OF LAW CONCERNING PROPOSED SETTLEMENT AGREEMENTS

Filed May 30, 1979

On May 16, 1979, a hearing was held before the court to consider, inter alia, the preliminary approval of twenty-three settlement agreements entered into by representatives of the plaintiffs' class [1] and various defendants herein. The court had previously requested full information bearing on the reasonableness of the settlements and had received voluminous materials from both proponents and opponents. Based on a very thorough study of all these materials and on the knowledge of the corrugated

[1] The following settlements were entered into by representatives of both container purchasers and sheet plants, prior to the court's order creating two subclasses: St. Regis, International Paper, Union Camp, Boise Cascade, Chesapeake of Virginia, Diamond International, Longview Fibre, Dura Containers, Champion International, Menasha, and Willamette. The following were entered into on behalf of the container purchaser subclass: Olinkraft, Weyerhaeuser, Container Corp. of America, Stone, Owens-Illinois, St. Joe, Inland, Continental, MacMillam Bloedel, Green Bay Packaging, and U.S. Corrugated Fibre Box. The settlement with Consolidated Packaging was negotiated on behalf of both subclasses.

industry acquired by the court during the recent four-ten week trial of the cases brought by the United States against various members of the industry, the court has no hesitation in stating that these settlements are within the range of possible approval and that notice of them should be given to the class members.

While mindful of the fact that this determination is in no way a definitive or dispositive ruling on the settlements, the court has decided to make certain findings and conclusions for the record at this point. This is because there has been opposition to the settlements from various quarters, and it would appear to be in the interest of all parties and of the expeditious processing of this litigation to clarify the court's position at this time on several issues which have been raised in the settlement context.

This litigation is a consolidation of a large number of cases filed throughout the country alleging a price-fixing conspiracy on the part of various manufacturers of corrugated sheets and containers. The cases, which now number over fifty, were consolidated for pretrial purposes under 28 U.S.C. § 1407 by the Judicial Panel on Multidistrict Litigation and assigned to this court, apparently largely because the grand jury investigation into the alleged illegal activities was being conducted here. The litigation, now MDL-310, was consolidated here late in November, 1977. Immediately thereafter, the court ordered the creation of document depositories and organizing committees for plaintiffs and defendants.

In January, 1978, the grand jury returned indictments against fourteen of the thirty-seven corporations who are defendants in MDL-310, as well as twenty-six individual employees of various corrugated manufacturers. During the pendency of the cases brought by the United States, discovery was somewhat curtailed in MDL-310 to avoid any possible prejudice to the defendants in the criminal

cases. The court did order that the civil defendants turn over to the plaintiffs the nearly two million documents they had produced to the grand jury. In addition to this material, plaintiffs obtained copies of the documents designated by the government as potential trial exhibits. No depositions were conducted in MDL-310 until the criminal trial concluded in April, 1979, and written discovery was severely limited (as, for example, to the issue of class certification).

Nevertheless, MDL-310 was not left dormant during the pendency of the criminal proceedings. The Plaintiffs' Steering Committee, with the court's authorization,[2] began settlement negotiations on behalf of the class as defined in the complaint. In September, 1978 the court certified a class of direct purchasers of containers and sheets. Late in December, 1978, the court divided the purchaser class into two subclasses—sheet plants and the remainder of the original single class. Sheet plants are businesses that buy corrugated sheets from integrated companies such as the defendants and process them into boxes or other products which they then sell, in competition with the integrated companies. The order carving out a separate subclass of sheet plants was entered because there was some suggestion that a conflict could arise between the two groups, and because the court was not at that time familiar enough with the corrugated industry to be sure that such a conflict would not arise. It now appears clear that although differences may exist between the sheet plants and other corrugated purchasers, there are no inherent conflicts between them.

With this very simplified picture of the course of the litigation in mind, we can place the various proposed settlements chronologically. St. Regis, an unindicted civil defendant, was the first at $1.7 million. International

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[2] Pretrial Order No. 2, Para. 3, entered Dec. 7, 1977.

Paper, an indicted defendant who had pled nolo contendere to felony charges and who was a major corrugated manufacturer with just under 6% of the market, was the second at $8.3 million. Both these settlements occurred prior to class certification. The history of the negotiations has been described in some detail in papers filed with the court by the attorneys who participated in them. These settlements were clearly negotiated pursuant to court authority, with the concurrence of the entire Plaintiffs Steering Committee, in good faith, and at arms' length. They provided the class with a $10 million fund, without any reduction of the claim as against the remaining alleged joint tortfeasors; with protection against the possibility that the class would not be certified as well as the obvious protection against the possibility that plaintiffs would not prevail on the merits; and with significant concessions by International Paper as to discovery. These benefits clearly justify submission of these proposed agreements to the class for approval. It is true that these two settlements are relatively small compared with similar companies' settlements later on in the litigation. To deprive plaintiffs of the benefits of bargaining for early, ice-breaking settlements in exchange for reduced settlement amounts would be to invade the class attorneys' province and perhaps ultimately to do a serious disservice to the class.

The next nine proposed settlements were negotiated by the attorneys for designated class representatives, after class certification and before the creation of the subclasses. They were for a total sum of about $68.5 million and were entered into by defendants representing roughly 22% of the defendants' total corrugated market. One of the sheet plant plaintiffs, Great Northern, not at that time a designated representative, had filed on October 12 a motion to create a sheet plant subclass.

This motion, which was never opposed by any party, was not ruled on until December 26, 1978. These nine settlement agreements were entered into between October 12 and December 26. It has been urged by Great Northern that negotiations should not have been conducted pending a court ruling on its motion. For several reasons, this argument is unpersuasive. First, and perhaps most important, is the fact that no conflict has been demonstrated between the sheet plants and the rest of plaintiffs' class. The admitted differences—that sheet plants compete with the defendants in box sales, that they themselves may have participated in the alleged price-fixing activities as to boxes, that they desire injunctive relief as well as damages, and that their measure of damages may conceivably be different from other plaintiffs'—do not amount to a conflict such as would make a subclass necessary to protect the rights of the sheet plants. Many other groups can be identified within the main class, for any one of whom the measure of damages may differ: West Coast plaintiffs,[3] plaintiffs who bought only from indicted (or unindicted) defendants, plaintiffs who bought only before (or after) the statute of limitations period, and so forth. The court does not consider such differences among groups as any indication that these nine settlements are inherently unfair.

Second, the Plaintiffs' Steering Committee which negotiated these nine agreements contained an attorney for Atlas Container, a sheet plant, then a designated representative of the one class, and currently a designated representative of the sheet plant sub-class. The primary function of the subclassing procedure is to in-

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[3] The indictments did not allege that the virtually nationwide conspiracy operated on the West Coast. This is not, of course, proof positive of its absence, but gives rise to a reasonable doubt as to whether West Coast purchasers stand on identical footing to others.

sure that the court is made aware of the possibly varied rights of class members. Atlas's attorney participated in the negotiations of these nine agreements on behalf of his sheet plant client and joins in the motion preliminarily to approve them. He has opposed certain provisions of eleven settlements which immediately succeeded the creation of the subclass, and is apparently willing and able to make his client's position known to the court.

Third, the proposed settlements appear on their face and from the extensive materials documenting their reasonableness to be well within the range of fairness and adequacy and to provide sufficient benefits to all class members that the class should be given notice and an approval hearing be set. The settlements were negotiated with authority, at arm's length, and in good faith by experienced attorneys, and are supported by the great preponderance of the class representatives.

The next eleven settlements to be considered were entered into only by the container purchaser subclass. Defendants were predictably and understandably reluctant to enter into negotiations which could not possibly end their exposure to all class members. These settlements contain a compromise provision which is the source of disagreement among plaintiffs' counsel, namely that if the sheet plant subclass decided to participate in these settlements they might receive up to a fixed amount [4] or a pro rata share, based on total dollar purchases from each defendant, whichever is smaller. The container purchaser subclass retains the right to oppose any allocation to the sheet plants, and no allocation can be made without the court's approval. This provision, common to all eleven proposed settlements, has aroused opposition

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[4] The dollar amounts vary as to each defendant, and were fixed, as a result of the container purchaser subclass's expert's research, at what the container subclass considered to be a likely pro rata share.

from two different quarters—one container purchaser subclass representative [5] complains that the rest of the representatives are giving the sheet plants something for nothing, and both sheet plant representatives complain that they are not being given enough. In fact, the court finds no fault with the proposed settlements on either ground. The settlements total approximately $230 million, of which a maximum of $14 million could conceivably be allocated to the sheet plants. From the statements made in their supporting documentation and before the court, it is apparent that plaintiffs' counsel were attempting to increase the bargaining power of the container purchaser subclass by offering defendants a possible ultimate settlement of the entire case as against them. From the statements made by counsel for some of this group of settling defendants, it is clear to the court that this hope of total settlement is of value to them. Even if the container purchaser subclass retains only $216 million out of these proposed settlements, the court cannot see that this would be inadequate, unreasonable, or an abandonment of plaintiffs' attorneys' obligations to the class.

The objections of the sheet plant representative that they have not been allocated enough are similarly insubstantial. Nothing in these settlements binds the sheet plant subclass unless they choose to participate in lieu of negotiating settlements on their own.

Finally, a proposed settlement has been negotiated on behalf of both subclasses with Consolidated Packaging Corp. for $180,000 total. The amount of this settlement has been very materially influenced by the financial difficulties in which that defendant finds itself. The court

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[5] Six of the original forty-nine plaintiffs join in this opposition, and one member of the Plaintiffs' Steering Committee (whose client supports the settlements) has also voiced this objection.

is fully familiar with these difficulties from its presentence investigation following Consolidated's plea of *nolo contendere* in the misdemeanor case. The settlement appears to be within a reasonable range and occupies the unique position of being wholly unopposed. It is hereby given preliminary approval.

As to the appropriateness of all the settlements, there are a few other points the court would like to make clear. Although formal discovery has been curtailed, plaintiffs have had access to a great deal of information about the industry and the defendants,[6] and these proposed settlements cannot be considered uninformed or premature. There are many risks for plaintiffs in this litigation; the recent acquittal of all who went to trial in the cases brought by the United States serve to emphasize some of the problems, and there are others that apply peculiarly to these civil cases, such as class certification problems and the proposed *Illinois Brick* legislation. Plaintiffs' ultimate success is by no means assured.

There have been some disputes among plaintiffs' counsel as to the proper measure of damages. It is not new for plaintiffs (and their experts) to disagree on their projection of possible recovery. The total dollar amount of these proposed settlements is record-breaking, and is well within a range which should be submitted to the class members for their approval or objections.

DONE at Houston, Texas, on this 30th day of May, 1979.

/s/ *John V. Singleton, Jr.*
United States District Judge

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[6] The grand jury documents submitted by each defendant; the government's bill of particulars and designated trial documents; materials prepared by the Fibre Box Association; studies by Arthur Andersen & Co. and by their own experts; and materials furnished by early-settling defendants pursuant to their agreements.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

M.D.L. No. 310 (All Cases)

NOTICE OF APPEAL

Filed June 8, 1979

NOTICE IS HEREBY GIVEN, that Westvaco Corporation ("Westvaco"), one of the defendants in the above named litigation, hereby appeals to the United States Court of Appeals for the Fifth Circuit from Paragraph 1, Pretrial Order No. 13 entered on the 30th day of May, 1979 in this litigation as a final judgment pursuant to Rule 54(b) F.R.C.P. dismissing all cross-claims for contribution including Westvaco's cross-claims.

Dated: June 5, 1979

SKADDEN, ARPS, SLATE, MEAGHER
& FLOM

By /s/ *Leslie H. Arps*
LESLIE H. ARPS
Attorneys for Defendant Westvaco
Corporation
919 Third Avenue
New York, N.Y. 10022
(212) 371-6000

[Certificate of Service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE: CORRUGATED CONTAINER
ANTITRUST LITIGATION

M.D.L. No. 310

This Document Relates To:

ALL ACTIONS IN WHICH GEORGIA-PACIFIC
CORPORATION HAS BEEN NAMED AND
SERVED AS A DEFENDANT

NOTICE OF APPEAL

Filed June 11, 1979

NOTICE IS HEREBY GIVEN, that Georgia-Pacific Corporation, one of the defendants in the above-named litigation, hereby appeals to the United States Court of Appeals for the Fifth Circuit from Paragraph 1, Pretrial Order No. 13 entered on the 30th day of May, 1979 in this litigation as a final judgment pursuant to Rule 54(b) F.R.C.P. dismissing all cross-claims for contribution including Georgia-Pacific's cross-claims.

Dated: June 7, 1979

ECKERT, SEAMANS, CHERIN & MELLOTT

By /s/ *Cloyd R. Mellott*
CLOYD R. MELLOTT
Attorney-in-Charge for
Georgia-Pacific Corporation
600 Grant Street
Forty-Second Floor
Pittsburgh, PA 15219
(412) 566-6000

[Certificate of Service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

M.D.L. No. 310

THIS DOCUMENT RELATES TO:

ALL ACTIONS IN WHICH PACKAGING
CORPORATION OF AMERICA HAS BEEN
NAMED AND SERVED AS A DEFENDANT

NOTICE OF APPEAL

Filed June 15, 1979

NOTICE IS HEREBY GIVEN, that Packaging Corporation of America, one of the Defendants in the above-named litigation, hereby appeals to the United States Court of Appeals for the Fifth Circuit from Paragraph 1, Pretrial Order No. 13, entered on the 30th day of May, 1979, in this litigation as a final judgment pursuant to Rule 54(b) F.R.C.P. dismissing all cross-claims for contribution, including Packaging Corporation of America's cross-claims.

DATED: June 14, 1979

/s/ *Preston Shirley*
PRESTON SHIRLEY, Attorney in Charge
for Packaging Corporation of America
700 First Hutchings-Sealy National
Bank Building
Galveston, Texas 77550
(713) 488-8716

OF COUNSEL:

JERRY P. FORTENBERRY
Senior Attorney, Tenneco, Inc.
Tenneco Building
P. O. Box 2511
Houston, Texas 77001

MILLS, SHIRLEY, MCMICKEN & ECKEL
700 First Hutchings-Sealy National
Bank Building
Galveston, Texas 77550
(713) 488-8716

[Certificate of Service omitted]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

M.D.L. No. 310 (All Cases)

NOTICE OF APPEAL

Filed June 25, 1979

NOTICE IS HEREBY GIVEN, that Westvaco Corporation ("Westvaco"), one of the defendants in the above-named litigation, hereby appeals to the United States Court of Appeals for the Fifth Circuit from Paragraph 2 of Pretrial Order No. 13, entered on the 30th day of May 1979 in this litigation, denying all motions by non-settling defendants, including Westvaco's motion, for leave to file amended or supplemental answers asserting as an affirmative defense that plantiffs have waived that portion of their claims for damages fairly allocable to the settling defendants.

Dated: June 22, 1979

SKADDEN, ARPS, SLATE, MEAGHER
& FLOM

By /s/ *Leslie H. Arps*
LESLIE H. ARPS
Attorneys for Defendant Westvaco
Corporation
919 Third Avenue
New York, New York 10022
(212) 371-6000

[Certificate of Service omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 79-2439

[DO NOT PUBLISH]

In Re CORRUGATED CONTAINER ANTITRUST LITIGATION

ADAMS EXTRACT COMPANY, ET AL.,
Plaintiffs-Appellees,

versus

ALTON BOX BOARD COMPANY, ET AL.,
Defendants,
WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA,
and GEORGIA-PACIFIC CORPORATION,
Defendants-Appellants,

BOISE CASCADE CORPORATION, ET AL.,
Defendants-Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

(October 30, 1979)

Before FAY, RUBIN and HATCHETT, Circuit Judges.

PER CURIAM:

This massive class action multi-party litigation is before us on an interlocutory basis with two questions being presented. The first question is whether a right of contribution is available to an antitrust defendant under the federal antitrust laws. The second question is whether an antitrust defendant may raise an affirmative defense of claim reduction. The district court answered both questions in the negative by denying motions to assert cross-claims for contribution and motions to amend answers by including the affirmative defense of claim reduction.

The question of the right of contribution under the federal antitrust laws has been answered by another panel of our court in Abraham Construction Corporation v. Texas Industries, Inc., —— F.2d —— (5th Cir. 1979). It was held that there is no such right.

We find that the second question dealing with claim reduction is not properly before us. Although the district court did enter an appropriate final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure as to the cross-claims (right of contribution), it refused to do so as to the affirmative defense (claim reduction). Under these circumstances we have no jurisdiction to consider this issue.

The ruling of the district court on the motions to file cross-claims (right of contribution) is AFFIRMED. The appeal from the order denying the requests to amend various answers to include the affirmative defense (claim reduction) is DISMISSED for lack of jurisdiction.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION	§	M.D.L. NO. 310
THIS DOCUMENT RELATES TO ALL CLASS ACTIONS EXCEPT: FRANKLIN CONTAINER CORP., ET AL. (C.A. NO. H-78-671)	§	

AGREEMENT OF SETTLEMENT BETWEEN CONTAINER PURCHASER AND SHEET PLANT SUBCLASSES AND DEFENDANT PACKAGING CORPORATION OF AMERICA

WHEREAS, certain plaintiffs are prosecuting M.D.L. No. 310 now pending before the above-entitled Court (hereinafter "the Court") as a class action;

WHEREAS, the Court ruled in its Order filed on September 6, 1978 that these actions may proceed as a class action on behalf of the class as defined in said Order (hereinafter "the Certified Class");

WHEREAS, the Court ruled in paragraph 4 of Pretrial Order No. 7, filed on December 26, 1978, that the Certified Class shall consist of a Sheet Plant sub-class, as defined in said Order of December 26, 1978, and a Container Purchaser sub-class comprised of the remainder of the members of the Certified Class;

WHEREAS, plaintiffs have alleged that defendant Packaging Corporation of America (hereinafter "Settling Defendant") was a participant in an unlawful conspiracy to fix, raise, maintain or stabilize the prices of corrugated containers and sheets and it has denied the material allegations of plaintiffs' complaints and raised certain affirmative defenses thereto;

WHEREAS, Settling Defendant, denying wrongdoing of any kind whatsoever, has nevertheless agreed to enter into

this Agreement of Settlement to avoid further expense, inconvenience and the distraction of burdensome and protracted litigation;

WHEREAS, plaintiffs have conducted investigations into the facts of these cases, reviewed at length and analyzed the grand jury documents produced by the defendants, the government trial exhibits made available to plaintiffs, the testimony at trial of the companion criminal cases, certain grand jury and government interview transcripts produced by the government, and have conducted formal and informal investigations, including document and deposition discovery regarding the claims of the plaintiffs against Settling Defendant, and have concluded that a settlement with Settling Defendant in the amount and on the terms hereinafter set forth is in the best interests of plaintiffs and the Container Purchaser and Sheet Plant sub-classes;

NOW, THEREFORE, it is agreed by and among the undersigned that these class actions be settled and compromised with Settling Defendant, upon approval by the Court, after a hearing as provided for herein, without affecting any joint and several liability of any non-settling defendant for any of the acts complained of by plaintiffs in any of their complaints including, but not limited to, acts of Settling Defendant, on the following terms and conditions:

1. The undersigned counsel represent that they are fully authorized to enter into the terms and conditions of, and execute, this Agreement.

2. The undersigned agree to undertake their best efforts, including all steps and efforts contemplated by this Agreement, and any other steps and efforts which may become necessary by order of the Court or otherwise, to effectuate this Agreement and the settlement set forth herein.

3. For the purposes of this Agreement only, the undersigned agree that there shall be designated the following

Settlement Class in M.D.L. No. 310:

> All persons in the United States (excluding defendants and all subsidiaries and affiliates of defendants and all independent corrugated box manufacturers as defined in the Unified and Consolidated Complaint on file herein) who purchased corrugated containers or corrugated sheets from any defendant, or any subsidiary or affiliate of any defendant, at any time during the period of January 1, 1960 to January 25, 1978, except for the following persons who are not included in said Settlement Class:
>
> > Those persons included on the Amended Opt-Out List of Class Members, filed November 20, 1979 (the Court's Docket No. 1099), other than those persons who were permitted by the Court to withdraw their requests for exclusion and to be included in the Certified Class by its Orders made January 8, 1980 and February 15, 1980.

For the purposes of this Agreement, said Settlement Class shall consist of the following sub-classes:

(a) A Container Purchaser sub-class which shall be identical to the Container Purchaser sub-class as defined and established by the Court in its Pretrial Order No. 7, dated December 26, 1978; and

(b) A Sheet Plant sub-class which shall be identical to the Sheet Plant sub-class as defined and established by the Court in said Order.

4. The Container Purchaser sub-class and the Sheet Plant sub-class of said Settlement Class shall be represented by the class representatives designated by the

Court in its Order dated October 26, 1978, as modified by the Court's Pretrial Order No. 7, dated December 26, 1978, or as may be otherwise ordered by the Court, who have entered into this Agreement.

5. In full and complete settlement of the claims asserted in these class actions by the members of the Settlement Class against Settling Defendant and subject to the remaining provisions hereof, Settling Defendant shall deposit Eight Million ($8,000,000.00) Dollars, in cash, in escrow, as described hereinafter, on or before the execution of this Agreement, and Settling Defendant agrees to and shall consent to the entry of a Consent Decree in the form annexed to this Agreement as Exhibit "B". Said amount and the interest thereon shall be referred to hereinafter as the "Fund." Settling Defendant further agrees that the Court may, subsequent to preliminary approval and prior to final approval of this settlement, order that an amount not to exceed $50,000.00 shall be paid out of the Fund to be used for the payment of costs and expenses incurred in connection with the giving of notice of the class action and of the proposed settlement to members of the class, including, but not limited to, the costs and expenses incurred in connection with compiling lists of class members and printing and mailing such notice. Such amount shall not be refundable to Settling Defendant in the event the settlement set forth in this Agreement is finally disapproved. Except as otherwise expressly provided herein, Settling Defendant shall not be liable for any costs or attorneys' fees, but all such costs and attorneys' fees as approved by the Court shall be paid out of the Fund and interest earned thereon. In the event federal income tax liability is finally assessed against and paid by Settling Defendant as a result of income earned in the Fund, Settling Defendant shall be entitled to reimbursment of such payment from the Fund. Settling Defendant will use its best efforts to resist any such assessment or payment.

6. The Fund shall be invested pursuant to the Escrow Agreement attached as Exhibit "A" hereto and made part hereof. Any interest earned on the Fund shall become and remain a part thereof. Settling Defendant, from time to time, may receive reports covering the status of the fund.

7. The escrow agent and plaintiffs will be reimbursed and indemnified out of the Fund for all costs and expenses incurred in the administration and distribution of the Fund. Disbursements for such costs and expenses shall be made from time to time only upon the approval of the Court. Settling Defendant shall have no responsibility with respect to the allocation, administration, or distribution of the Fund, except as expressly provided herein.

8. Except as provided in Paragraph 5 of this Agreement, no distribution of the Fund shall be made until (i) the Court has approved this Agreement and the settlement set forth herein pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, (ii) the entry of the Court's final judgment approving this Agreement and the settlement set forth herein and dismissing with prejudice the claims of the Settlement Class members against Settling Defendant, (iii) the final affirmance on appeal of, or the final dismissal of an appeal from or the expiration (without the filing or noticing of an appeal) of the time to appeal from said final judgment, and (iv) an order of the Court allowing such distribution. Subject to the foregoing, (a) distributions from the Fund approved by the Court may be made to pay approved costs and expenses, past and future, incurred by plaintiffs or their counsel in these M.D.L. proceedings, (b) such distributions may be made from time to time on an interim basis prior to the time when the remaining balance of the Fund may be distributed to Settlement Class members, and (c) all such interim distributions shall be paid from the Fund only if authorized or approved by and upon the

application of the Plaintiffs' Steering Committee and upon approval of the Court.

9. Upon the Court's approval of this Agreement and the settlement set forth herein, pursuant to said Rule 23(e), said final judgment shall be entered which shall provide that all claims of the Settlement Class as against Settling Defendant only arising under the antitrust laws of the United States or of any state or other jurisdiction, or any similar statutory or common law, which have been, might have been, are now or could be asserted in these actions in connection with corrugated containers and corrugated sheets or which relate to or arise out of the unlawful conspiracy to fix, raise, maintain or stabilize the prices of corrugated containers or corrugated sheets alleged in the Unified and Consolidated Complaint on file herein, or any amendments thereto, shall be dismissed with prejudice.

10. The settlement set forth in this Agreement shall not become effective unless and until this Agreement is approved in M.D.L. No. 310 in all respects by the Court (including the approval of the Settlement Class, as defined in paragraph 3 hereof), and, in the event that the Court refuses to approve this Agreement or any material part of it, this entire Agreement shall become null and void unless all parties promptly agree to proceed with the settlement as and if modified by the Court. In the event this Agreement becomes null and void for any reason, the Fund shall be disbursed to Settling Defendant, except that any funds actually expended or expenses incurred as respects notice to the class as provided in Paragraph 5 above, shall not be refundable to Settling Defendant, and except that any costs of administering the Fund or the settlement set forth in this Agreement, exclusive of attorneys' fees, shall first be deducted before the Fund is returned to Settling Defendant. It is expressly understood and agreed that this Settlement Agreement shall remain

in full force and effect notwithstanding any revocation or modification by any court of the Court's September 6, 1978 Class Certification Order, or paragraph 4 of the Court's December 26, 1978 Pretrial Order No. 7.

11. The fact of this settlement with the Settling Defendant shall not be construed to affect, in any manner whatsoever, any joint or several liability of any of the nonsettling defendants for the conspiracy and their acts alleged in the complaints, including, but not limited to, any acts of Settling Defendant, any putative common law rule or practice, or state or local statute, to the contrary notwithstanding. Claimants upon the Fund prior to participation therein will execute and deliver covenants not to sue Settling Defendant, or any of its present or former officers, directors or employees, under the antitrust laws or any similar statutory or common law, asserting claims which relate to or arise out of the unlawful conspiracy to fix, raise, maintain or stabilize the prices of corrugated containers or sheets alleged in the Unified and Consolidated Complaint on file herein, as amended, on the checks or claim forms.

12. Effective upon the execution of this Agreement by the undersigned counsel, Settling Defendant agrees to cooperate fully with the designees of Plaintiffs' Steering Committee in connection with each of the following matters:

(a) Settling Defendant agrees that, notwithstanding the entry of said final order or judgment, pursuant to paragraph 9 hereof, Settling Defendant shall continue to be considered a party defendant in these class actions for the sole purpose of discovery to be conducted pursuant to the Federal Rules of Civil Procedure.

(b) Unless otherwise ordered by the Court, Settling Defendant agrees to retain, pending the final disposition of all class action cases brought on behalf of the Container Purchaser subclass and the Sheet Plant Subclass involved in the these MDL proceedings, all documents or other evidence, if any, in its possession, custody or control, or in the possession, custody or control of its attorneys or other agents relating to the subject matter of these MDL proceedings, including but not limited to, copies of transcripts of the proceedings before the United States Grand Jury for the Southern District of Texas in its investigation of the corrugated container industry, interviews by Government attorneys taken in connection with said investigation, interviews of witnesses taken by or on behalf of Settling Defendant, and summaries thereof; and subject to an agreed protective order and the provisions of Pretrial Order No. 7, filed December 26, 1978, as modified by the Court's Order filed January 12, 1979 (or as Pretrial Order No. 7 may hereafter be modified by the Court) to promptly deliver or otherwise make readily available to the designated representatives of Plaintiffs' Steering Committee, all documents and other evidence relevant to the claims asserted in the Unified and Consolidated Complaint in Settling Defendant's possession, custody or control pursuant to requests made by Plaintiffs' Steering Commitee.

(c) Nothing in this Agreement shall require Settling Defendant to provide any information or documents subject to an attorney work

product, attorney-client, or Fifth Amendment privilege (arising either individually or as part of a group defense effort), or a court order of non-disclosure, nor shall such privileges be deemed waived.

(d) Settling Defendant shall, consistent with Settling Defendant's obligations, identify with particularity the information or documents which are subject to the provisions of paragraph 12(c) and the factual basis for the asserted privilege, to the extent that such identification does not constitute a breach of the asserted privilege.

13. Entry of the Consent Decree in the form annexed to this Agreement as Exhibit "B" should not be made until (i) the Court has approved this Agreement and the settlement set forth pursuant to Rule 23(e), Federal Rules of Civil Procedure, and (ii) the entry of the Court's final judgment approving this Agreement and the settlement set forth herein and dismissing with prejudice claims of the Settlement Class members against Settling Defendant.

14. This Agreement may be executed in counterpart by the parties hereto and shall become effective upon its execution by the undersigned counsel as of the 20th day of March, 1980.

MANDELL & WRIGHT
Stephen D. Susman, Chairman
Plaintiffs' Steering Committee
806 Main Street, 21st Floor
Houston, Texas 77002

McGOVERN, OPPERMAN & PACQUIN
Vance K. Opperman, Vice Chairman
Plaintiffs' Steering Committee
1100 National City Bank Building
510 Marquette Avenue
Minneapolis, Minnesota 55402

By: Stephen D. Susman
STEPHEN D. SUSMAN

On Behalf of Plaintiffs' Steering Committee (except James Sloan and Granvil Specks) and All Designated Class Representatives of the Container Purchaser sub-class (except Ilikon Corporation).

By: H. L. Montague, Jr.
H. LADDIE MONTAGUE

BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, Pennsylvania 19103

On Behalf of Designated Class Representatives of the Sheet Plant Sub-Class (except Great Northern Packaging Corp. and Huron Packaging Corp.)

By: E. Houston Harsha
E. HOUSTON HARSHA

KIRKLAND & ELLIS
200 E. Randolph Drive
Chicago, Illinois 60601

On Behalf of Packaging Corporation of America.

ESCROW AGREEMENT

This Escrow Agreement, made and entered into this 25th day of March, 1980, among Packaging Corporation of America (hereinafter "Settling Defendant") a defendant in the Corrugated Container Antitrust Litigation, MDL 310, now pending in the United States District Court for the Southern District of Texas (the "Court"), the Plaintiff Class in such litigation, including both the Container Purchaser Sub-Class and the Sheet Plant Sub-Class (hereinafter the "Class") and First City National Bank of Houston (hereinafter the "Escrow Agent").

This Escrow Agreement shall become effective as between Settling Defendant and the Class and the Escrow Agent upon execution of this Agreement by Settling Defendant, by the Class and by the Escrow Agent, and the deposit by Settling Defendant of Funds in escrow as provided herein.

W I T N E S S E T H:

WHEREAS, an Agreement of Settlement, to which a copy of this Agreement is attached as an exhibit thereto and made a part thereof (hereinafter the "Settlement") has been entered into to settle the claims of the Class against Settling Defendant; and

WHEREAS, Settling Defendant has agreed that in full and complete settlement of the claims asserted by the Class in the class actions against it, subject to Court approval of the Settlement, Settling Defendant shall place into an escrow account the sum indicated in the Settlement (hereinafter called the "Fund") to earn interest and to be invested strictly according to the terms of this Agreement during the period prior to final approval and effectuation of the Settlement and distribution of the Fund to the Class; and

WHEREAS, it has been agreed that Settling Defendant shall have no responsibility with respect to the adminsitration and distribution of the Fund except as expressly provided in the Settlement;

NOW, THEREFORE, it is agreed that for good and valuable consideration, the undersigned Settling Defendant will transfer to the Escrow Agent the Fund, receipt of which the Escrow Agent acknowledges by execution of this Agreement. Such transfer by Settling Defendant shall constitute an irrevocable transfer of the Fund for the express and singular purpose of paying the liabilities of Settling Defendant under the Settlement, subject to the rights of Settling Defendant to receive the return of the Fund in the event that the Settlement as to it becomes terminated or null and void for any reason. The Fund, together with interest thereon, additions or increments thereto and reductions therefrom shall be held, invested and disbursed by the Escrow Agent strictly in the manner and subject to the conditions set forth below.

1. All funds received from Settling Defendant shall be held separately and segregated from Funds received from any other settling defendant, and separate statements of principal and interest shall be prepared for the fund of each settling defendant on a monthly basis.

2. The Escrow Agent shall invest and reinvest the Fund in Authorized Investments. Any monies held as a part of the Fund shall be invested or reinvested by the Escrow Agent in Authorized Investments. "Authorized Investments" shall be investments in (1) any bonds or other obligations of the United States of America which as to principal and interest constitute direct obligations of the United States of America, (2) obligations of the Federal National Mortgage Association, Government National Mortgage Association, Federal Intermediate Credit Banks, Federal

Banks for Cooperatives, Federal Home Loan Banks or Federal Financing Banks, (3) certificates of deposit of banks or trust companies, or notes of national bank holding companies, including the Escrow Agent, organized under the laws of the United States of America, or any state thereof, which have combined capital and surplus of at least $25,000,000.00, (4) prime commercial paper rated A-1 (Standard & Poors) or P-1 (Moody's), (5) re-purchase agreements, and (6) money market funds. In investing in Authorized Investments, the Escrow Agent shall seek to obtain the best yields consistent with safety of principal and ready marketability. The Escrow Agent, as part of the consideration for the acceptance of this Agreement, shall not be liable for any acts or omissions done in good faith, nor for any claims, demands or losses, nor for any damages made or suffered by any party to this Agreement, excepting such as may arise through or be caused by its willful or gross negligence. The Escrow Agent may make any and all such investments through its own bond department or the bond department of any bank or trust company under common control with Escrow Agent. All such investments shall at all times be made pursuant to the Settlement Agreement, and all income and profits on such investments shall be credited to, and losses thereon shall be charged against the Fund. The Escrow Agent shall have the authority to sell such investments from time to time as it shall deem appropriate.

3. Upon receipt of a certificate signed by counsel for Settling Defendant and the attorneys for the Class signatory hereto, or their successors appointed by the Court, stating that a Court order has been entered for advance to attorneys for the Class of the costs incurred in securing approval of the settlement, as defined in the Settlement, the Escrow Agent shall disburse such amount to the attorneys for the Class.

4. Upon receipt of certificates signed by counsel for Settling Defendant and by the attorneys for the Class signatory hereto, or their successors appointed by the Court, stating that: (a) the court has approved the Settlement pursuant to Rule 23 of the Federal Rules of Civil Procedure; (b) the Court has entered final order or judgment approving the Settlement and dismissing with prejudice the actions of the Class Members against the Settling Defendant; (c) there has been a final affirmance on appeal of, or the final dismissal of an appeal from, or the expiration (without the filing or noticing of an appeal) of the time to appeal from said final order or judgment; (d) the Court has ordered distribution of the Fund to the Class and (e) that all preconditions to such distribution as contained in the Settlement have been met; the Escrow Agent will deposit or distribute the Fund as the Court, on notice to the Escrow Agent, may direct. Such deposit by the Escrow Agent shall be for the sole purpose of immediate distribution as ordered by the Court. In the event that on the date of deposit the Escrow Agent is holding investments that have not reached maturity, the Escrow Agent will hold said investments until maturity, or will sell such investments at the market as attorneys for the Class may direct, and then deposit the proceeds thereof in the manner described above.

5. Upon receipt of a certificate signed by counsel for Settling Defendant and order of the Court that its Agreement of Settlement has become terminated or null and void for any other reason, the Escrow Agent shall forthwith disburse the Fund to Settling Defendant. In the event that on the date of such disbursements the Escrow Agent is holding investments which have not reached maturity, the Escrow Agent will hold said investments until maturity, or will sell such investments at the market price as attorneys for the Settling Defendant may direct, and disburse such funds accordingly.

6. For its services, the Escrow Agent shall receive fees in accordance with the letter dated December 26, 1978, from the Escrow Agent, the original or a copy of which is attached hereto as Exhibit 1 and made a part hereof. All such fees shall constitute a direct charge against the Fund, but Escrow Agent shall not debit the Fund for any such charge until it shall have presented its statement to and received approval of counsel for Settling Defendant executing this agreement and for the Plaintiff Class signatory hereto. Such fees and all expenses charged against the Fund shall be paid out of income.

7. It is further agreed by the undersigned that:

(a) The Escrow Agent's duties and responsibilities shall be limited to those expressly set forth in this Escrow Agreement. The Escrow Agent shall not be subject to, or obliged to recognize any other agreement between the parties hereto, or directions or instructions not specifically set forth herein; provided, however, with Escrow Agent's written consent, this Escrow Agreement may be amended at any time or times by an instrument in writing signed by all the then parties in interest.

(b) The Escrow Agent is authorized, in its sole discretion, to disregard any and all notices or instructions given by any of the undersigned or by any other person, firm or corporation, except only such notices or instructions as are herein provided for. The Escrow Agent shall not make any payment or disbursement from the Fund which is not expressly authorized by this Agreement. The Escrow Agent shall notify all parties hereto, in writing and immediately of any claim of any kind whatsoever made against the Fund.

(c) In executing its duties and responsibilities hereunder, the Escrow Agent may reasonably rely only upon a written notice, demand, certificate or document set forth in

this Agreement or Court Order as valid authorization and direction to the Escrow Agent.

(d) Unless otherwise specifically indicated herein, the Escrow Agent shall proceed as soon as practicable to collect any checks or other collection items at any time deposited hereunder. All such collections shall be subject to the usual collection agreement regarding items received by its commercial banking department for deposit or collection. The Escrow Agent shall not be required or have a duty to notify anyone of any payment or maturity under the terms of any instrument deposited hereunder, nor to take any legal action to enforce payment of any check, note or security deposited hereunder.

8. This Escrow Agreement shall be binding upon, and inure to the benefit of, the respective parties hereto, their successors and assigns provided, however, that no party may assign its interest under this Escrow Agreement without the prior written consent of the other parties to this Escrow Agreement, and such consent shall not be unreasonably withheld.

(a) The Escrow Agent may resign from this Escrow Agreement, and thereby become discharged from the obligations hereby created, by notice in writing given to Settling Defendant and the attorneys for the Class signatory hereto, or their successors appointed by the Court, not less than sixty (60) days before such resignation is to take effect, but such resignation shall take effect immediately upon the substitution of a new Escrow Agent hereunder, if such new Escrow Agent shall be substituted before the time limited by such notice and shall then accept the obligations thereof.

(b) If at any time hereafter the Escrow Agent shall resign, be removed, be dissolved or otherwise become incapable of acting, or the bank or trust company

acting as Escrow Agent shall be taken over by any governmental official, agency, department or board, or the position of the Escrow Agent shall become vacant for any of the foregoing reasons or for any other reason, Settling Defendant shall appoint an Escrow Agent to fill such vacancy.

(c) Every successor Escrow Agent appointed hereunder shall execute, acknowledge and deliver to its predecessor, and also to Settling Defendant and the agents and attorneys of the Class signatory hereto, or their successors appointed by the Court, an instrument in writing accepting such appointment hereunder, and thereupon such successor Escrow Agent, without any further act, shall become fully vested with all the rights, immunities, and powers, and subject to all of the duties and obligations, of its predecessor; but such predecessor shall, nevertheless, on the written request of its successor, and upon payment of the expenses, charges and other disbursements of such predecessor which are payable pursuant hereto, execute and deliver an instrument transferring to such successor Escrow Agent all the rights, immunities and powers of such predecessor hereunder; and every predecessor Escrow Agent shall deliver all property and monies held by it hereunder to its successor. Should any instrument in writing from Settling Defendant be required by any successor for more fully and certainly vesting in such Escrow Agent the rights, immunities and powers hereby vested or intended to be vested in the precedessor Escrow Agent, any such instrument in writing shall and will, on request, be executed, acknowledged and delivered by Settling Defendant.

9. Each recipient of any portion of the Fund, whether a Settling Claimant or Settling Defendant, shall bear the liability, if any, for any taxes on the income earned on such portion of the Fund received by the recipient.

10. No Class Member shall have any right, title or interest in or to any portion of the principal or interest of the Fund until such time as Class Member, pursuant to order of the Court authorizing distribution, shall receive payment of its approved pro rata share of the settlement fund.

11. The Settling Defendant shall not have any right, title or interest to any portion of the principal or interest of the Fund until such time as Settling Defendant, pursuant to the settlement and this Agreement, shall receive return of its contribution to the Fund upon termination of the Settlement.

12. No representations or warranties have been made by or shall be implied against or as to any party with respect to the facts or transactions upon which this Escrow Agreement is based. The Escrow Agent is and shall be independent and neither Settling Defendant nor the Class retain any authority whatever relative to the investment of the Fund, provided only that as parties hereto, Settling Defendant and Class shall be entitled to institute actions to compel or require performance by the Escrow Agent of its obligations hereunder.

13. It is understood and acknowledged by the parties hereto that the Court may, at any time, appoint an investment adviser to direct the investment and reinvestment of the Fund and suggest that the parties enter into a custody agreement so that the Escrow Agent will become a custodian of the Fund, investing same at the direction of the investment adviser so appointed and charging only standard custodial fees for its services. The parties hereto agree to enter a custody agreement to replace this Escrow Agreement in the event the Court does appoint an investment adviser for the Fund.

14. All certificates, notices, requests, demands, and other communications hereunder shall be in writing and shall be deemed to have been duly given if addressed and delivered or deposited in the U.S. mails by registered or certified mail, return receipt requested, postage prepaid, to the undersigned Settling Defendant through its counsel signatory hereto; to Class Members through attorneys for the Class signatory hereto, and to the Escrow Agent as follows:

First City National Bank of Houston
909 Fannin Street
Post Office Box 809
Houston, Texas 77002

Attention: Mr. Jack Little

15. This Escrow Agreement shall be governed by and construed in accordance with, the laws of the State of Texas.

16. This Escrow Agreement may be executed in a number of different counterparts, all of which together shall be deemed to constitute one agreement, and any party may execute this Escrow Agreement and become a party hereto by signing any such counterpart.

17. The Escrow Agent shall not be bound by nor deemed a party to the Settlement and its sole responsibility shall be to act only as expressly set forth in the Escrow Agreement.

18. The signatories hereto represent and warrant that they are fully authorized to enter into the terms and conditions of, and to execute this Agreement on behalf of the respective parties hereto.

IN WITNESS HEREOF, the Escrow Agent, the Plaintiff Class, and the undersigned Settling Defendant have caused

this Escrow Agreement to be signed as of the date and year first above written.

FIRST CITY NATIONAL BANK OF HOUSTON

By: _____
Vice President

ATTEST:

_____
Trust Officer

THE PLAINTIFF CLASS

By: _____
Stephen D. Susman

PACKAGING CORPORATION OF AMERICA

By: _____
E. Houston Harsha

DATED:

March 25, 1985

FIRST CITY NATIONAL BANK
OF HOUSTON

JACK M. LITTLE, III
Vice President & Trust Officer

December 26, 1978

Mr. Sidney Ravkind
Mr. Stephen D. Susman
Mandell & Wright
1901 First National Life Building
Houston, Texas 77002

Re: Corrugated Container Antitrust Litigation

Dear Messrs. Ravkind and Susman:

This is to advise you of First City National Bank's fees for serving as escrow agent in connection with the settlement of this litigation. The following schedule will apply to each separate Escrow Account:

A basic annual fee of $450 which will be prorated in the event of withdrawal or termination.

A transaction charge of $20 for each purchase or sale of a security or other investment.

An annual investment management fee of 1/20 of 1% of the market value of the assets in the account. This fee will be pro-rated to the date of termination when an account terminates.

A fee of $2.00 per remittance, including payments of costs and distributions of funds to Plaintiffs.

In no event shall the total of the above-stated fees annually exceed 1/10 of 1% of the market value of the assets.

Yours truly,

Jack M. Little III
Vice President & Trust Officer

2 HOUSTON CENTER, SUITE 750, 909 FANNIN, P.O. BOX 809
HOUSTON, TEXAS 77001, TELEPHONE (713) 658-6821
MEMBER FIRST CITY BANCORPORATION OF TEXAS, INC.

Exhibit 1

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION	§	
	§	M.D.L. NO. 310
THIS DOCUMENT RELATES TO ALL CLASS ACTIONS EXCEPT:	§	
FRANKLIN CONTAINER CORP., ET AL. (C.A. NO. H-78-671)	§	

CONSENT DECREE

WHEREAS, plaintiff Atlas Container filed its complaint herein on February 1, 1978, plaintiffs Great Northern Packaging Corp. and Huron Packaging Corp. filed their complaint on October 25, 1978, and plaintiff Rollins Container, Inc. filed its complaint herein on February 20, 1979, and

WHEREAS, each of the aforesaid plaintiffs (the "Settling Plaintiffs") filed on its own behalf and on behalf of a class as defined in the respective complaints; and

WHEREAS, the Court certified, on September 6, 1978, a class consisting of all persons in the United States (excluding defendants and all subsidiaries and affiliates of defendants and all independent corrugated box manufacturers) who purchased corrugated containers or corrugated sheets from any defendant, or any subsidiary or affiliate of any defendants, at any time during the period from January 1, 1960 to January 25, 1978, and the Court on December 26, 1978, certified two subclasses thereof including a Sheet Plant Subclass consisting of all Sheet Plants (as defined in the Court's Order of December 26, 1978) which purchased corrugated sheets in the United States during the period January 1, 1960, to January 25, 1978; and

Exhibit "B"

WHEREAS, Rollins Container, Inc. was named as third representative of the Sheet Plant Subclass pursuant to Pretrial Order No. 16 dated June 8, 1979; and

WHEREAS, the above-named plaintiffs (or a majority of them), as representatives of the Sheet Plant Subclass, and the undersigned defendant (hereinafter referred to as "Settling Defendant"), a defendant in one or more of these three actions, by its respective attorneys, have agreed to entry of this Consent Decree without admission of any liability and without trial or adjudiciation of any issue of fact or law in the above proceedings, and without this Consent Decree constituting evidence or any admission by any party signatory hereto with respect to any such issue, and

WHEREAS, the Consent Decree and the injunction ordered and granted herein, pursuant to Rule 65(d) of the Federal Rules of Civil Procedure, constitutes an integral part of the Settlement Agreement, dated _____, of the above actions entered into by Settling Defendant and the Settling Plaintiffs, acting as representatives of the Sheet Plant Subclass;

NOW, THEREFORE, following appropriate research, investigation, inquiry and negotiations, but without trial or adjudiccation of any issue of fact or law in the above proceeding, and upon the consent of the signatory parties and with the approval of this Court pursuant to Rule 23 of the Federal Rules of Civil Procedure, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

I.

JURISDICTION

This Court has jurisdiction of the subject matter of this action and of each of the parties to this Consent Decree.

II.

DEFINITIONS

A. "Corrugated sheets" consist of linerboard (a flat paper product manufactured in mills and sold in rolls) and medium (a paper product manufactured in mills and sold in rolls), glued together in layers in which the fluted medium is between the two or more layers of linerboard.

B. "Corrugated containers" are containers made of corrugated sheets.

C. A "sheet plant" is defined as a person (excluding present defendants in MDL 310 and all subsidiaries and affiliates of such defendants) who (a) purchased corrugated sheets, (b) manufactured and sold corrugated containers and/or corrugated fillers, pads and partitions which were sold for use in or with corrugated containers, and (c) did not manufacture corrugated sheets.

III.

APPLICABILITY AND NOTICE

Within thirty (30) days after the effective date of this Consent Decree, Settling Defendant is ordered and directed to deliver a copy of the Consent Decree to each of its officers and regional managers, plant managers and sales managers, whose product responsibility includes corrugated sheets or corrugated containers, and thereupon file an affidavit with the Clerk of the Court, with a copy thereof to the attorneys for the class, that it has done so, which affidavit shall set forth the name of each person so served.

The effective date of this consent decree is defined in Section VIII, infra.

IV.

PRICE FIXING-PREDATORY PRICING

Settling Defendant is enjoined and restrained from directly or indirectly entering into, adhering to, enforcing, furthering, or maintaining any unlawful combination, conspiracy, agreement, or understanding with any other manufacturer

or seller of corrugated containers or corrugated sheets to:

(a) Fix, depress, raise, stabilize or otherwise maintain prices, or to exchange prices, or price formulae, or other terms of conditions of and for the sale of corrugated sheets to any member of members of the Sheet Plant Subclass;

(b) Divide, allocate, or otherwise apportion customers which are members of the Sheet Plant Subclass or markets composed of such customers with respect to corrugated sheets;

(c) Refrain from soliciting the business of or refrain from dealing with, any customer or potential customer for corrugated sheets which is a member of the Sheet Plant Subclass;

(3) Engage in a practice of predatory pricing with respect to corrugated sheets in relation to corrugated containers or corrugated containers in relation to corrugated sheets, including, but not limited to, a price squeeze affecting members of the Sheet Plant Subclass.

V.

MONOPOLIZATION - PREDATORY PRICING

Settling Defendant is enjoined and restrained from monopolizing, conspiring to monopolize, or attempting to monopolize any relevant geographic market for corrugated containers or corrugated sheets in violation of the federal antitrust laws by engaging in a practice of predatory pricing with respect to corrugated sheets in relation to corrugated containers or corrugated containers in relation to corrugated sheets.

VI.

RECORD RETENTION

A. For the purpose of assuring and securing compliance with this Consent Decree, Settling Defendant shall retain during the period of this Consent Decree such books and records, including, but not limited to, correspon-

dence and memoranda, maintained in the usual and ordinary conduct of its corrugated sheet and corrugated container business as may be necessary to determine costs, prices, profits, transactional data, and expense accounts for the persons described in Section III, supra.

B. In the event that any Settling Plaintiff or any member of the Sheet Plant Subclass has reasonable cause to believe that the terms and conditions of this Decree may not have been complied with by any plant or plants of Settling Defendant, then such Settling Plaintiff or member of the Sheet Plant Subclass may petition this Court, on a showing of such reasonable cause, for an Order directing such Settling Defendant to show cause why Settling Defendant should not be required to produce all books and records of such plant or plants of such Settling Defendant relevant to such alleged non-compliance with the terms and conditions of this Decree, subject to the entry of an appropriate protective order.

C. No information obtained by the means provided in Subparagraph B of this Section shall be divulged to any person or used for any purpose other than in the course of legal proceedings for thepurpose of securing compliance with this Consent Decree, or as otherwise required by law.

VII.

RETENTION OF JURISDICTION

Until the termination of this Consent Decree, jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Consent Decree to apply to this Court at any time for such further order and directions as may be necessary or appropriate for the construction, implementation, or carrying out of this Consent Decree, for the enforcement of compliance therewith, and for the punishment of any violation.

VIII.

EFFECTIVE DATE OF DECREE

This Consent Decree shall become effective upon approval by the District Court in the above-captioned actions in accordance with and as provided in the Settlement Agreement executed and delivered by the parties concurrently herewith. Any appeal thereof will not delay the effective date of this Consent Decree. This Consent Decree shall, subject to the terms of the Settlement Agreement, remain in effect until January 31, 1984, at which time it shall terminate.

IX.

CONSTRUCTION, INTERPRETATION AND ENFORCEMENT OF THIS DECREE

A. This Consent Decree shall be construed, interpreted and enforced so as to carry out its principal purpose of protecting competition.

B. Nothing contained in this Consent Decree shall be construed to prohibit conduct lawful under the antitrust laws, including the Sherman Act, the Clayton Act and the Robinson-Patman Act, nor shall anything in this Consent Decree be construed to authorize conduct prohibited by such antitrust laws.

X.

AMENDMENTS

This Decree may be amended in writing but only upon consent of the attorneys for the Sheet Plant Subclass (or a majority of them) and counsel for the settling defendant with the approval of the Court, with notice to all Subclass representatives, but without further notice to members of the Sheet Plant Subclass, unless otherwise directed by this Court.

DATED:

Representatives of the
Sheet Plant Subclass

ROLLINS CONTAINER, INC.

By_____
Its Attorney

PACKAGING CORPORATION OF AMERICA

By_____

ATLAS CONTAINER

By_____
Its Attorney

ORDERED, ADJUDGED AND DECREED ON _____,

1980.

_____
Judge of the District Court

CERTIFICATE OF SERVICE

This is to certify that on the 25th day of March, 1980, a true and correct copy of Agreement of Settlement Between Container Purchaser and Sheet Plant Subclasses and Defendants Packaging Corporation of America was served on attorneys for all plaintiffs and attorneys for all defendants, by mailing same to them at their business office addresses with first-class postage affixed.

Stephen D. Susman

STEPHEN D. SUSMAN

U. S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
DEC 21 1979
V. BAILEY THOMAS, CLERK
DEPUTY:

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION	§	
THIS DOCUMENT RELATES TO ALL ACTIONS EXCEPT:	§	M.D.L. No. 310
FRANKLIN CONTAINER CORP., ET AL. (C.A. H-78-671)	§	

PRETRIAL ORDER # 31

A pretrial conference and settlement hearing was held before the court on December 3 and 4, 1979, to decide whether certain proposed settlements herein should be finally approved, and other matters. The court having studied the various motions, objections, briefs, memoranda, and argument on these issues, makes the following order:

1. International Paper's objection to the production of documents relating to linerboard on the ground of relevancy are OVERRULED.

2. The application of the Sheet Plant Subclass for allocation of $11,000,000.00 from the settlements of Container Corporation of America, the Continental Group, Green Bay Packaging, Inland Container, McMillan Bloedel and its participating subsidiaries, Olinkraft, Owens-Illinois, St. Joe Paper Company, Stone Container Corporation, U. S. Corrugated Fibre Box Company, and Weyerhaeuser Company with the container purchaser subclass, unopposed by the container purchaser subclass, is adequate, fair and reasonable and it is hereby GRANTED.

3. In light of this court's and the Fifth Circuit's holding that there is no right of contribution in these antitrust cases, it is hereby ORDERED that

a. Defendant the Mead Corporation's complaint attempting to assert a right of contribution in these cases is hereby dismissed with prejudice;

b. All other contribution claims and cross-claims still pending in this litigation are hereby dismissed with prejudice.

4. For the reasons set forth in the attached Memorandum Opinion, which is incorporated herein by reference, the motion of class representatives for final approval of settlements with the following defendants is GRANTED: Boise Cascade, Champion International (and Hoerner Waldorf), Chesapeake Corporation of Virginia, Consolidated Packaging Corporation, Container Corporation of America, the Continental Group, Diamond International, Dura Containers, Green Bay Packaging, Inland Container, International Paper, Interstate Container, Longview Fibre Corporation, MacMillan Bloedel (including MacMillan Bloedel Containers, MacMillan Bloedel Packaging, and MacMillan Bloedel Limited), Menasha Corporation, Olinkraft, Owens-Illinois, St. Joe Paper Company, St. Regis Paper Company, Stone Container Corporation, U.S. Corrugated Fibre Box Company, Union Camp, Weyerhaeuser Company, and Willamette Industries, Western Kraft and Corco, Inc. All objections to these settlements are OVERRULED.

5. For the reasons set forth in the attached Memorandum Opinion, the motions of South Carolina objectors to permit filing of claims without release of state claims, and to remove state claims from the class allegations are DENIED.

6. The plaintiff class representative's proposed plan of distribution to class members is APPROVED, for reasons set forth in the attached Memorandum Opinion.

7. The application of the State of Kansas for an extension of time to opt out of the class is DENIED.

8. Plaintiffs' motion to direct defendants to furnish purchase records as requested by absent class members or Arthur Anderson & Co. is DENIED.

9. Plaintiffs request that paragraph 6 of Pretrial Order No. 11 be amended to provide that plaintiffs shall have access to documents in defendants' possession relating to the period 1960-1969 on the same basis as documents relating to 1970 and thereafter

is GRANTED and paragraph 6 of Pretrial Order No. 11 is hereby rescinded.

10. Any party wishing to challenge the representation by Mr. Fred A. Freund (of the firm Kaye, Scholer, Fierman, Hays and Handler) of members of the plaintiffs' class or subclasses, or the participation of Mr. Freund on the Claims Subcommittee of Plaintiffs' Steering Committee, shall file its motion to disqualify by December 31, 1979.

11. The next pretrial conference in these cases shall be January 8, 1980, at 9:30 A.M.

DONE and ENTERED this 21st day of December, 1979, in Houston, Texas.

UNITED STATES DISTRICT COURT

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
MAY 29 1980
JESSE E. CLARK, CLERK
BY DEPUTY: R. Smith

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE CORRUGATED CONTAINER	§	
	§	M.D.L. 310
ANTITRUST LITIGATION	§	(ALL CLASS CASES)

PRETRIAL ORDER 52

The court having held conferences in this litigation on May 22, 23, 26, and 27, and having studied the numerous motions pending, enters the following order:

1. The trial date is postponed until Monday, June 2, 1980.

2. The motions of Bookout & Mitchell and the American Lutheran Church to withdraw their requests for exclusion from the class are GRANTED. They shall be considered class members with all the rights and obligations accruing to that status.

3. The motions of Crown-Zellerbach, Packaging Corporation of America, Georgia-Pacific, Fibreboard Corporation, Potlatch Corporation, and the Fibre Box Association for severance are GRANTED. Any trial of these six causes shall be stayed pending final resolution of their settlements with the class.

4. Defendants' motion for reconsideration on the admission of evidence of fifth amendment invocations is DENIED.

5. Plaintiffs' motion in limine to preclude mention before the jury of treble damages is GRANTED.

6. Plaintiffs' motion in limine to preclude mention of acquittals in the criminal case and defendants' motions to preclude mention of the grand jury investigation, indictments, nolo pleas, and settlements are all GRANTED except for the court's instructions to the jury.

7. Defendants' motion in limine to preclude reference to counsel as being from cities other than Houston is GRANTED.

8. Plaintiffs' motion for an order declaring portions of grand jury and interview statements admissible under Rule 804(b)(3), F.R.E., is DENIED.

9. Plaintiffs' motion for an order declaring portions of grand jury and interview statements admissible under Rule 801(d)(2)(D), F.R.E., is GRANTED as to statements made during the existence of an employment relationship with Mead, Alton, or Westvaco. Such statements would be admissible under this section only against the employer.

DONE this 28th day of May, 1980 in Houston, Texas.

UNITED STATES DISTRICT JUDGE